Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DUNN,

Petitioner,

V.

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

In this Louisiana capital case, involving an African-American defendant and two white victims, where 82% of the venire was white, the defense was forced to seat a juror predisposed towards the death penalty because the trial court inverted the *Batson/McCollum* analysis and required the defendant to carry the burden of proof to establish that his strike of a white juror was race-neutral. This inversion of the *Batson* shield gives rise to the following question:

Whether the Louisiana court's modification of the three-step *Batson* analysis, requiring the defense to prove that the Defense's strikes were not motivated by race- while simultaneously requiring the defense to prove that the State's strikes were motivated by race - violates the 6th and 14th Amendments.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Dunn respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Louisiana in this case.

OPINIONS BELOW

The opinions below include an opinion affirming Mr. Dunn's conviction for the murders of Jacqueline Guillot Blanchard and Lisa Dupuis, pretermitting "review of the penalty phase of defendant's trial and remand[ing] to the district court for a hearing in conformity with this opinion to determine whether or not defendant is mentally retarded." See Appendix B, *State v. Dunn,* 01-1635 (La. 11/01/02); 831 So.2d 862. The opinions below also include an opinion by the Supreme Court of Louisiana affirming the trial court's ruling that Mr. Dunn is not mentally retarded and affirming his conviction and sentence of death. See Appendix A, *State v. Dunn,* 01-1635 (La. 05/11/10); 2010 La. LEXIS 1218. Finally, the opinions below include the denial of rehearing, which is unpublished and is reproduced at Appendix C.

JURISDICTION

The Supreme Court of Louisiana issued its initial opinion affirming Mr. Dunn's conviction on November 1, 2002. However, at that time the Louisiana Supreme Court remanded the case to the trial court for a hearing to determine whether Mr. Dunn suffers from mental retardation. The

Louisiana Supreme Court affirmed Mr. Dunn's conviction and sentence on May 11, 2010. That decision became final on June 25, 2010, when Mr. Dunn's application for rehearing was denied. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the following constitutional provisions:

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

James Dunn, a black man, was sentenced to death by a jury of ten whites and two blacks. Mr. Dunn attempted to exercise a peremptory strike against Juror Robert Anderson, a white man. The trial court created its own rule that if either party exercised three or more strikes against jurors of any particular race, that party must thereafter provide race-neutral reasons for its peremptory strikes. When asked to provide a race-neutral reason for striking Mr. Anderson, defense counsel cited Mr. Anderson's eagerness to impose the death penalty in this particular case. The trial court apparently confused this Court's three-step *Batson* analysis with the analysis used to determine whether a juror should be struck for cause and found that this was not a race-neutral reason for striking Mr. Anderson. Without any basis for finding that the defendant was exercising his peremptory strikes on the basis of race, the trial court seated Mr. Anderson as a juror. The Louisiana Supreme Court apparently suffered from the same confusion as the trial court and, deferring to the trial court's decision, affirmed the conviction.

During voir dire, the court had the following colloquy with Mr. Anderson regarding the death penalty:

> Q: In regards to the death penalty, you said you're in favor of the death penalty?
>
> A: In most circumstances, yes.

Q: Do you have any general opposition to the death penalty?

A: Yes.

Q: You have opposition to the imposition?

A: I don't think I could do that in something like a violent - - like a mercy killing or you know, something like that, I don't think that would be warranted.

Q: Well, what I'm asking you is this. If you were selected as a juror in this case, would your makeup, knowing you, do you feel that you would be against the death penalty?

A: **Not in this situation.**

Q: I'm sorry?

A: Not in this situation, I don't think I would be against it.

Q: Now, you said not in this situation?

A: **In this situation, I could go by - - I could see the death penalty.**

Q: Now, I'm going to walk this line real carefully. Have you heard anything about this case, other than what's been

mentioned in this courtroom? Don't tell me if you have heard anything.

A: No, I haven't heard anything other than what's been in here.

Q: Okay.

A: **But, like they said, there were some graphic pictures and it sounded violent to me.**

Q: Okay. Have you formed an opinion already on this case?

A: No.

Q: Okay. Would you keep an open mind prior to making any decision?

A: Yes.

Q: So, would you automatically vote to impose the death penalty?

A: No, sir.

Q: Would you consider all of the mitigating circumstances during the penalty phase, prior to making a decision as to death by lethal injection or life imprisonment without benefit of probation, parole or suspension of sentence?

A: Yes.

Q: Would you give more weight to an aggravating circumstance than a mitigating circumstance?

A: No.

R. 2400-02. This is the only substantive conversation Mr. Anderson had with the court or counsel during voir dire other than his admission to the prosecutor that he was being facetious when he wrote on his juror questionnaire that he admires Bill Clinton. R. 2433

When the defendant attempted to exercise a peremptory strike against Mr. Anderson, the State said, "we request that it's a continuing *Batson* challenge at this point." The trial court never ruled that the state made a prima facie case of racial discrimination. Rather, the trial court was simply applying its own three-strike rule, which the defense had objected to. R. 2651-52. The following colloquy is the entirety of the discussion and ruling concerning the defense's attempted peremptory strike of Mr. Anderson:

MR. PASTOR [Defense counsel]: Mr. Anderson not only said that he favors the death penalty, but in fact he favors the death penalty in most circumstances. I feel that he's more than ready to vote for death. I had a

few challenges left, I chose not to have him on my jury.

MS. O'BANNON [The prosecutor]: Your Honor, this guy is Catholic, and his religion - - his religious organization believes that the death penalty is wrong. He said that he can vote for death, but he wouldn't automatically do so, that he would consider mitigating circumstances, and it just depends on the situation. I don't think Mr. Anderson said or did anything that would indicate that he would be anything but a fair and impartial juror, and I believe he's excluded based on race.

MR. PASTOR [Defense counsel]: Can I make one more comment? Mr. Nolting has some notes I didn't have. Mr. Nolting's notes also reflect that he - - and I forgot, I didn't write this down, I had very limited space - - but that the situations that it was not warranted in - -the death penalty was not warranted - - would be in the mercy killing. That he could give the death penalty in a situation where there was a violent death.

MR. NOLTING [Defense counsel]: He said in this situation.

MR. PASTOR [Defense counsel]: In this situation. That he has no problem giving the death penalty let's say in this situation.

MR. NOLTING [Defense counsel]: In this case.

THE COURT: **Well, that's not the criteria**. I remember this particular juror's response, as I went through that clearly with him. I don't see anywhere in there where this individual would refuse to look at all the circumstances and consider any lesser included offense so far as this particular charge is concerned. I don't see anything in his responses, in totality, so far as the penalty phase is concerned, that he would not consider all mitigating circumstances and aggravating circumstances. Your argument so far as a race neutral reason under *Batson*, when considering the argument of the State, your argument and the responses of Mr. Anderson, I do not find that you stated a race neutral reason for Mr. Anderson. Therefore, Mr. Anderson will be Juror No. 6.

MR. PASTOR [Defense counsel]: Note our objection, Your Honor.

R. 2482-84. The trial court did not require the state

to make a prima facie showing that the defense discriminated on the basis of race, grossly misinterpreted the second step of the *Batson* inquiry, and did not require the State to bear the burden of proving racial discrimination as required by the third part of the *Batson* test.

Nonetheless, the Supreme Court of Louisiana held:

> Given the responses of Anderson to the questions of counsel and the court and considering the great deference afforded the trial court relative to the evaluation of discriminatory intent, we are convinced the trial court did not err in determining that counsel for defendant engaged in discrimination by exercising a peremptory challenge against Anderson.

State v. Dunn, 01-1635 (La. 11/01/02); 831 So.2d 862, 872. Neither the trial court nor the Louisiana Supreme Court provided any reason for believing that the peremptory strike against Mr. Anderson *was* based on his race. Rather, they apparently found that Mr. Dunn failed to prove that the peremptory strike *was not* based on race. This shifting of the burden to the party exercising a peremptory strike is inconsistent with this Court's prior decisions and should be reversed.

REASONS FOR GRANTING THE WRIT

Petitioner James Dunn respectfully asks this

Court to grant the writ of *certiorari* to review the judgment of the Supreme Court of Louisiana in this case, to vacate the judgment below, and to summarily grant relief in this case of obvious constitutional error. The Louisiana Supreme Court upheld the trial court's decision to adopt its own rule in place of this Court's three-step *Batson* analysis, which led to the absurd result of a juror being seated against the defense's will without any evidence that the defense was exercising the strike on the basis of race. *Batson* was designed to shield against the danger of minority jurors being intentionally excluded from juries. It is patently offensive to the Constitution to allow the State to turn the shield of *Batson* into a sword to not only stack the jury with white jurors but also to force a *particular white juror* onto the jury against Mr. Dunn's will at a time when Mr. Dunn had not exercised all of his peremptory challenges. This Court should grant certiorari to consider whether a trial court may relieve the opposing party of its burden of proving purposeful discrimination by creating its own system of evaluating *Batson* objections rather than using this Court's well-established three-part *Batson* test. This is of particular concern in a case such as this, where the defendant is a black man attempting for race-neutral reasons to strike a particular white man from a jury that is already overwhelmingly white.

I. Three-part *Batson* test

Since the enactment of the Civil Rights Act of 1875, it has been illegal to exclude persons from jury service on the basis of their race. See 18 U.S.C.

§ 243. *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Since at least about this time, if not longer, lawmakers in Louisiana have set about to manage the exclusion of African-Americans from the polls and the jury box. In recognition of the constitutional violations and societal harm involved in excluding jurors on the basis of race, this Court has held that neither the State nor the Defendant may exercise its peremptory challenges on the basis of the race of the juror. *See. e.g. Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42 (1992). *Batson* provides the three-step process a trial court is to use in determining whether a peremptory challenge was based on race:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[;s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[;and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Miller-El v. Dretke, supra, at 277, 125 S.Ct. 2317, 162 L.Ed.2d 196* (Thomas, J., dissenting)(quoting *Miller-El v. Cockrell*, 537 U.S. 322, 238-329, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)).

Snyder v. Louisiana, 552 U.S. 472 (2008).

The third step of the *Batson* analysis "involves evaluating 'the persuasiveness of the justification'

proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' *Purkett, supra*, at 768, 115 S.Ct. 1769, 131 L.Ed.2d 834." *Rice v. Collins*, 546 U.S. 333, 338 (2006). This Court has placed the burden of persuasion squarely on the opponent of the peremptory strike to prove racial motivation rather than on the party exercising the peremptory strike to prove a lack of racial motivation.

II. The trial court eliminated the first part of the three-part *Batson* test

For reasons unbeknownst to counsel, the trial court chose not to apply this well-known three-step analysis in this capital case. Instead, the trial court made its own rule that if either party exercised three or more peremptory strikes against a juror of any particular race, that party must thereafter provide a race-neutral reason for its peremptory challenges. R. 2481, 2651-53. The first effect of this court-created rule is to eliminate the requirement that the party opposing the peremptory strike make a prima facie case of racial discrimination.

This, of course, also means that with a jury pool that is 82.5% white, the parties will certainly have to justify their challenges of white jurors, as the vast majority of jurors who could potentially be struck peremptorily are white. When the defense pointed out the problem with the small number of black jurors in the jury pool and argued, "If she's saying that I can't exclude somebody because they are white, then I might as well not have any

challenges at all" the prosecutor responded, "Well, that's your problem." R. 2470. That should not have been Mr. Dunn's problem. Had the trial court applied the three-step analysis from *Batson*, it would have been the state's problem to prove purposeful discrimination. The trial court's ad hoc rule improperly placed the burden on the defense to prove that the strikes he exercised against white jurors *were not* exercised on the basis of race without the State having to offer any evidence whatsoever that the strikes *were* exercised on the basis of race.

III. The trial court unreasonably applied the second part of the three-part *Batson* test

In addition to eliminating the first part of the *Batson* test that would have required the State to make a prima facie case of racial discrimination, the trial court incorrectly applied the second part of the *Batson* test. This Court has explained:

> The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez, 500 U.S. at 360* (plurality opinion); *id., at 374 (*O'CONNOR, J., concurring in judgment).

Purkett v. Elem, 514 U.S. 765, 767-68 (1995). "What it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. at 769 (citations omitted). Contrary to the trial court's ruling, defense counsel certainly provided a race-neutral reason for peremptorily striking Mr. Anderson.

Any lawyer well-versed in capital defense has almost assuredly been trained to select jurors in a capital case almost exclusively on the basis of their attitudes toward the death penalty. That is precisely what counsel for Mr. Dunn attempted to do in this case. Mr. Dunn's counsel had every reason to believe that Mr. Anderson was predisposed to impose the death penalty in this case. Mr. Anderson said so himself. He said that he might have a problem imposing the death penalty upon someone guilty of a mercy killing, which is not much of a concession, since a mercy killing would not be a capital case. However, he said where there is a violent killing he believes in imposing the death penalty.

Arguably Mr. Anderson could have been challenged for cause, as every genuine capital case involves a violent killing. Mr. Anderson, without having heard any evidence in this case, stated that he would not have a problem imposing the death penalty in this case, as he heard in jury selection that there were gruesome photographs. In light of Mr. Anderson's responses, it would be irresponsible for a defense attorney who has peremptory challenges still remaining not to exercise one of them on Mr. Anderson. Reading between the lines, it is

clear that Mr. Anderson would vote to impose the death penalty in any case that is genuinely a capital case. In fact, Mr. Anderson ultimately did vote to impose the death penalty upon Mr. Dunn.

Given the racial composition of the pool of potential jurors no lawyer in his right mind could have thought that he could keep whites from serving on the jury or even from constituting the vast majority of the jury. Elementary mathematical principles would reveal to even the most simple-minded lawyer that he must select among jurors on some basis other than race with a jury pool that is 82.5% white.

Without a doubt, a juror's predisposition to impose the death penalty for a violent killing is a race-neutral reason for the exercise of a peremptory strike in a capital case. For the Louisiana Supreme Court to uphold the trial court's decision holding otherwise was a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment as well as of Mr. Dunn's Sixth Amendment right to a fair trial before an impartial jury.

IV. The trial court eliminated the third part of the three-part *Batson* test

Just as the trial court eliminated the first step of the *Batson* inquiry, the trial court also eliminated the third step of the *Batson* inquiry, which requires the trial court to determine whether the opponent of the strike has carried its burden of proving purposeful discrimination. This is the entirety of the trial court's ruling and explanation regarding its

ruling on the defense's peremptory strike of Mr. Anderson:

> Well, that's not the criteria. [Whether the juror stated that he had no problem imposing the death penalty in this particular case.] I remember this particular juror's response, as I went through that clearly with him. R. 2483. I don't see anywhere in there where this individual would refuse to look at all the circumstances and consider any lesser included offense so far as this particular charge is concerned. I don't see anything in his responses, in totality, so far as the penalty phase is concerned, that he would not consider all mitigating circumstances and aggravating circumstances. Your argument so far as a race neutral reason under *Batson,* when considering the argument of the State, ,your argument and the responses of Mr. Anderson, I do not find that you stated a race neutral reason for Mr. Anderson. Therefore, Mr. Anderson will be Juror No. 6." R. 2484

The State never provided any reason for believing that the defense was exercising its peremptory strikes on the basis of race. The "argument of the State" that the court is referencing is not an argument by the State presenting its reasons for believing that the peremptory challenge was based on race. It is simply an argument by the

State that Mr. Anderson did not say that he would automatically impose the death penalty. This is the entirety of the State's argument regarding the strike of Mr. Anderson:

> Your Honor, this guy is Catholic, and his religion - - his religious organization believes that the death penalty is wrong. He said that he can vote for death, but he wouldn't automatically do so, that he would consider mitigating circumstances, and it just depends on the situation. I don't think Mr. Anderson said or did anything that would indicate that he would be anything but a fair and impartial juror, and I believe he's excluded based on race. R. 2483.

At no point did the State provide a reason for believing that the defense was exercising its peremptory strikes on the basis of race. The State was not even asked to provide such a reason, as the trial court had established the "three strike" rule, a rule that was utterly unfair to the defense given the overwhelming number of whites in the jury pool.

V. The trial court's ruling was not based on the juror's or the attorney's demeanor, but on an improper application of the law

This Court has stated that race-neutral reasons for peremptory challenges often involve a juror's demeanor, making the trial court's

observations of the juror even more important.

> In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," *ibid.* (quoting *Wainwright v. Witt, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985)*), and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]," *500 U.S. at 366, 111 S. Ct. 1859, 114 L. Ed. 2d 395* (plurality opinion).

Snyder v. Louisiana, 552 U.S. 472, 477 (2008). However, in this case the trial court was silent on demeanor. He stated that he relied on the juror's responses. R. 2483-2484. Moreover, the reason given by the defense for striking Mr. Anderson does not require firsthand observation of Mr. Anderson's demeanor or of the defense attorney's demeanor. It is clear from a cold reading of the record that Mr. Anderson was predisposed to impose the death penalty in this particular case. He said that he would not have a problem imposing the death penalty in this particular case, as it sounded like a violent killing with gruesome photographs. He said

this without having seen any of the photographs or hearing any of the evidence. This is simply not a case that turns on the demeanor of the juror or the attorney. Thus, the deference given by the Louisiana Supreme Court to the trial court is not appropriate in this situation.

Deference to the trial court is particularly inappropriate in light of the trial court's admission that he never read *Georgia v. McCollum*,[1] the only case which would have possibly authorized him to seat a juror who had been peremptorily struck by the defense. R. 2656-2657. It is also inappropriate for this Court to give deference to a trial court that chose to create its own rule for determining *Batson* issues rather than applying this Court's well-established three-part *Batson* test. As this Court stated in *Johnson v. California*, 545 U.S. 162, 168 (2005), "Those three *Batson* steps should by now be familiar." It is unclear from the record of this trial whether the trial court ever read *Batson* or this Court's other cases interpreting *Batson*. The trial court did state that this was his first capital case. R. 1999. Thus, this was the court's first time dealing with *Batson* issues in the context of *Witherspoon v. Illinois*, *Wainwright v. Witt*, and *Morgan v. Illinois*.

It is evident that the trial court did not even recognize a juror's death penalty views as a race-neutral reason for excluding that juror peremptorily. This Court stated in *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), "Thus, we presume the [] court's factual findings to be sound unless [the defendant] rebuts the 'presumption of correctness by clear and

---

[1] "Well, I haven't read the case." (referring to *Georgia v. McCollum*) R 2656-2657.

convincing evidence.' *§ 2254 (e)(1).* The standard is demanding but not insatiable; as we said the last time this case was here, 'deference does not by definition preclude relief.' *Miller-El v. Cockrell, 537 U.S. at 340, 154 L. Ed. 2d 931, 123 S. Ct. 1029."* The Louisiana Supreme Court erred in deferring to the trial court's decision when the trial court neither read nor applied the applicable law.

VI. This was not a one-time misapplication of *Batson*

In *Rivera v. Illinois,*[2] 129 S.Ct. 1446, 1455 (2009), this Court observed, "To hold that a one-time, good faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff." This was not a one-time misapplication of *Batson.*

The trial court chose, for whatever reason, to create its own three-strike rule in place of this Court's well-established three-part *Batson* test. It is

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[2]In *Rivera v. Illinois,* this Court held that there is not a rule of automatic reversal when a court improperly seats a juror that a defendant attempted to strike peremptorily, as state law controls the consequences of an erroneous denial of a peremptory challenge. Unlike Illinois law, Louisiana law provides for automatic reversal where a peremptory challenge is wrongfully denied. *See, e.g., State v. Cross,* 93-1189 (La. 6/30/95); 658 So.2d 683, 686. This case is distinguishable from *Rivera* in that this case involves the erroneous interpretation of *Batson,* not the constitutionality of the state court remedy for the wrongful denial of a peremptory challenge.

not too much to ask a state court to at least read and make a genuine effort to follow this Court's established precedents when ruling on a criminal defendant's alleged discriminatory use of peremptory challenges. The trial court acted in an arbitrary and irrational manner in shifting the burden to the defense to prove a lack of discriminatory intent and then applying a cause analysis to a peremptory strike to determine whether the strike was made on a discriminatory basis. Under these circumstances, this Court should reverse the decision of the Supreme Court of Louisiana affirming the trial court's arbitrary and irrational misapplication of *Batson*.

The arbitrariness of the trial court's decision is obvious from a side-by-side comparison of the trial court's treatment of the state's peremptory exclusion of black juror Mr. Robert Thomas versus the defense's attempted peremptory exclusion of white juror Mr. Anderson. When asked to give a race-neutral reason for its peremptory strike of Mr. Thomas, the state responded:

> Your Honor, again, although this juror stated that he does not oppose the death penalty, **now obviously that is not our standard**, there was a couple of reasons that the State felt that he would not be fair and impartial in this particular case. When the Court was questioning him about his views on the death penalty and mitigating circumstances, he indicated that drugs and alcohol to him would be an excuse -

> - well, not an excuse but a circumstance in which he would impose the life sentence. I don't know whether or not that's evidence that Mr. Pastor or Mr. Nolting intend to present, that this defendant was under drugs or alcohol, but my impression was that that mitigating circumstance would be given such great weight that this juror could not fairly consider the death penalty as an option. I also was concerned because his wife was against the death penalty and I was concerned that perhaps his feelings about the death penalty were not perhaps as strong as the ability to actually impose it, should he be faced with that decision. So, for those reasons I excluded him. R. 2669-2670.

The defense stated at that point that the defense had no intention of introducing evidence of drug or alcohol use and had already so informed the state. R. 2670. The trial court's ruling with respect to the State's peremptory challenge of Mr. Thomas was as follows:

> Well, based on the response of the State and considering both the argument of defense and the State and also *Batson*, so far as race neutral reasons are concerned, **that the case really is liberal so far as the race neutral reasons are concerned.** I mean, they've given instances where I may not

> agree with so far as the reason that they allow the exclusion of a particular person or class of individual from a jury. The Court feels that in this particular case the State has stated a race neutral reason pursuant to *Batson*. R. 2672.

Thus, when ruling on the State's peremptory challenge of a black juror, the trial court recognized that this Court has a liberal interpretation of race-neutral reasons and that a juror's views on the death penalty constitute a race-neutral reason for excluding the juror. However, when ruling on the defense's peremptory strike of Mr. Anderson, a white juror, the trial court found that a juror's views on the death penalty are not a race-neutral reason for excluding that juror. Thus, the trial court not only created its own rule instead of applying this court's three-step *Batson* analysis but also applied the rule arbitrarily and irrationally.

Nor is this the first time this particular judge has erred in this way. A review of the voir dire of the last three capital cases involving Judge Alvin Turner and Assistant District Attorney Robin O'Bannon shows a troubling pattern of discrimination against potential black jurors. In these cases, the court, on the State's urging, has compelled black defendants to accept white jurors thus limiting the possible seats on the jury available to black jurors. In the present case and *State v. Scott*, 2004-1312 (La. 01/19/06); 921 So.2d 904, and *State v. Miller*, 23rd Judicial District, Case No. 11533, the trial court compelled the black defendants to accept a total of eight white jurors in spite of

defense peremptory challenges.

A review of reported cases fails to reveal a single 23rd Judicial District case in which a defense *Batson* challenge was granted in spite of the fact that the parish governments in the district have engaged in consistent patterns of race and gender discrimination in other areas. *See e.g.* Joe Gyan, *Consent Decree Ends Sex Bias Suit with Sheriff,* The Advocate, March 8, 1996, at 6B (Assumption Parish Sheriff's Office settled a sex discrimination lawsuit with a female deputy); Howard Castay, *Certain Proms Still Dance to the Beat of Separation and Segregation,* The Louisiana Weekly, May 12, 2003 (U.S. Department of Education's Civil Rights Department investigating segregated proms in Assumption Parish public high schools); *Summerchase Ltd. Ptshp. I v. City of Gonzales,* 970 F. Supp. 522 (M.D. La. 1997)(Gonzales city officials' revocation of building permits was done with the intent to discriminate against minorities and had a discriminatory effect on minorities in violation of the FHA.); *Clark v. Roemer,* 777 F. Supp. 471 (D. La. 1991) (voting practices and districts in Assumption Parish "affords black citizens 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'")

Significantly, Anthony Falterman, who was the 23rd Judicial District Attorney at the time of Mr. Dunn's arrest and trial, was the Assumption Parish Sheriff during the time in which the sexual discrimination in the Sheriff's Office was found to have occurred. *United States v. Sheriff of Assumption Parish,* 1995 U.S. Dist. LEXIS 15017; 69

Fair Empl. Prac. Cas. (BNA) 129 (E.D. La. 1995).

This review revealed at least one other case in which the 23rd Judicial District Attorney's Office, tried by District Attorney Falterman, compelled a black defendant to accept white jurors over peremptory challenges. *State v. Spencer,* 631 So.2d 1363, 1365-66 (La. App. 5 Cir. 1993) (black defendant is compelled to accept three white jurors over peremptory challenges).

Given the history of racial discrimination in the 23rd Judicial District, it is difficult to believe that poor black defendants are discriminating against white jurors and that the District Attorney and his assistants, who have been found to discriminate in other areas, are conducting voir dire without regard to the race of the jurors. It is also difficult to believe that whites were being intentionally excluded from a jury that ultimately consisted of ten whites and two blacks.

Across these three cases, defendants were only presented with five black veniremembers that the State did not successfully cause challenge or peremptory challenge. Thus, though the defendants had only five opportunities to use their collective 36 peremptory challenges against black veniremembers, the court found that they had discriminated against eight white veniremembers and they were compelled to accept them as jurors (There were four white jurors foisted on the black defendant in *Miller,* three in *Scott* and one in this case). This trend of suppressing minority representation on juries by compelling parties to accept white jurors will undoubtedly continue and expand unless courts and prosecutors are given a

clear indication that this sort of backhanded discrimination will not be tolerated.

VII. This case is distinguishable from *Hernandez v. New York*

In *Hernandez v. New York,* 500 U.S. 352, 359 (1991), this court stated, "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." However, this case is distinguishable. In *Hernandez,* as soon as the defense objected to the peremptory strikes on the basis of race the prosecutor began offering a race-neutral explanation for the strikes without waiting for the trial court to rule whether a prima facie case of discrimination had been established. However, once the prosecutor offered a race-neutral explanation for the strikes, the court held the defense to its burden, as the opponent of the peremptory strike, of proving that the prosecutor was exercising the strikes on the basis of race. This Court's decision in *Hernandez* does not authorize a trial court to shift the burden from the opponent of the strike to the proponent of the strike, as was done in this case by the trial court's three-strike rule.

VIII. The elimination of parts one and three of the three-part *Batson* test and the unreasonable application of part two of the test resulted in a violation of the United States Constitution

This Court has, on multiple occasions, explained the constitutional interests involved when race infects the jury selection process.

> The constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, see *476 U.S., at 97, 90 L. Ed. 2d 69, 106 S. Ct. 1712,* nor to those citizens who desire to participate "in the administration of the law, as jurors," *Strauder v. West Virginia, 100 U.S. 303, 308, 25 L. Ed. 664 (1880).* Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson, 476 U.S. at 87, 90 L. Ed. 2d 69, 106 S. Ct. 1712;* see also *Smith v. Texas, 311 U.S. 128, 130,*

> *85 L. Ed. 84, 61 S. Ct. 164 (1940).* ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government" (footnote omitted)).

Johnson v. California, 545 U.S. 162, 171-172 (2005). The three-step process serves the public purposes *Batson* is designed to vindicate while also encouraging prompt rulings on objections to peremptory challenges without substantially disrupting the jury selection process. *Johnson v. California*, 545 U.S. 162, 172-73 (2005), *citing Hernandez v. New York*, 500 U.S. 352, 358-359 (1991)(opinion of Kennedy, Jr.).

The result of the trial court's erroneous application of *Batson* was the seating of a juror merely on the basis of his race. Although the State did not even attempt to make a prima facie showing that the defense was excluding jurors on the basis of race and the court did not provide any basis for finding that the defense was excluding jurors on the basis of race, Mr. Anderson was forced into service on this jury against the wishes of Mr. Dunn and Mr. Anderson[3] merely because he was white. Had Mr.

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[3]Mr. Anderson made it very clear after being selected that he did not wish to serve on the jury. R 2487. He explained that he worked for a small hospital pharmacy that was having staffing problems and that his service on this jury "can sincerely cause public endangerment." R 2490.

Anderson not been white, Mr. Dunn would have been allowed to strike him on the basis of his views on the death penalty. While Mr. Dunn "has no right to a 'petit jury composed in whole or in part of persons of [his] own race,' *Strauder* 100 U.S., at 305, he [] does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers v. Ohio*, 499 U.S. 400, 404 (1991). It was a violation of the equal protection clause of the Fourteenth Amendment to seat Mr. Anderson over Mr. Dunn's objection merely on the basis of Mr. Anderson's race. It was particularly offensive in light of the fact that Mr. Anderson is white and Mr. Dunn is a black man who was ultimately tried by a jury consisting of ten whites and only two blacks.

This Court's original concern in *Swain v. Alabama,* 380 U.S. 202 (1965) and *Batson v. Kentucky* was that peremptory strikes were being "used to discriminate against black jurors." *Batson,* 476 U.S. 79, 99. While there is certainly a rich historical basis for this concern, there is no such historical basis for any concern that whites are being systematically excluded from juries. When this Court decided in *Georgia v. McCollum*, 505 U.S. 42 (1992), that it was a violation of the equal protection clause for a white criminal defendant to intentionally exclude blacks from a jury, Justice Thomas stated in his concurring opinion, "Eventually, we will have to decide whether black defendants may strike white veniremen." *Georiga v. McCollum (Thomas, concurring)*, 505 U.S. 42, 62. While this Court has not yet addressed this issue directly, many state courts, including the Supreme Court of Louisiana in this case, have presumed that

the answer is that black defendants may not strike white veniremen on the basis of race.

It is important to note how far we have come from the original concerns of *Swain* and *Batson* in now presuming that a black defendant violates the due process clause when he excludes white veniremen. Whether this Court ultimately agrees with that result, the attempted application of that principle by the trial court in this case led to an absurd and unconstitutional result. Mr. Dunn, a black man, who was convicted and sentenced to death by a jury consisting of ten whites and two blacks, was denied his right to a peremptory challenge of a white juror merely on the basis that the juror was white. The trial court relied on federal law to deny Mr. Dunn's state constitutional right to a peremptory challenge because Mr. Dunn attempted to strike a white juror, despite the fact that the jury was already overwhelmingly white and the juror that Mr. Dunn sought to strike had predetermined that he believed in the death penalty in this particular case. Under these circumstances, it is hard to imagine how this is not a violation of Mr. Dunn's right to due process of law and to a fair trial by an impartial jury. Nonetheless, it is certainly a violation of the equal protection rights of the minority jurors who might have otherwise served on this jury had Mr. Anderson, a white man, not been forced onto the jury as a result of the trial court's erroneous interpretation of *Batson v. Kentucky*.

CONCLUSION

For the foregoing reasons, Petitioner James Dunn respectfully asks this court to grant the writ of *certiorari* to review the judgment of the Supreme Court of Louisiana in this case, to vacate the judgment below, and to summarily grant relief in this case of obvious constitutional error.

RESPECTFULLY SUBMITTED,

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APPENDIX A

STATE OF LOUISIANA
VERSUS JAMES DUNN

NO. 2001-KA-1635

SUPREME COURT OF
LOUISIANA

2001-1635 (La. 05/11/10);
2010 La. LEXIS 1218

May 11, 2010, Decided

NOTICE:

THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.

PRIOR HISTORY:

ON APPEAL FROM THE 23RD JUDICIAL DISTRICT COURT, PARISH OF ASSUMPTION, HONORABLE ALVIN TURNER, JR., JUDGE.

State v. Dunn, 974 So. 2d 658, 2008 La. LEXIS 164 (La., 2008)

DISPOSITION: AFFIRMED.

COUNSEL: BATON ROUGE CAPITAL CONFLICT OFFICE, David William Price, Kyla Blanchard-Romanach; For Appellant.

James D. Caldwell, Attorney General, Ricky Lamar Babin, District Attorney, Donald David Candell, Robin Catherine O'Bannon, Assistant District Attorneys; For Appellee.

JUDGES: CIACCIO, Justice. Retired Judge Philip C. Ciaccio, assigned as Justice ad hoc, sitting for Chief Justice Catherine D. Kimball. KNOLL, Justice, additionally concurs with reasons.

OPINION BY: CIACCIO

OPINION

[Pg 1] CIACCIO, J. *

Following remand, this matter returns to this court on appeal from the trial court's determination that defendant, James Dunn, is not mentally retarded and is therefore not exempt from capital punishment. For the reasons that follow, we affirm the trial court's ruling in that respect. Furthermore, this court's capital sentence review pursuant to La. Sup. Ct. Rule 28 dictates the death sentence imposed in this case is not disproportionate. The defendant's sentence of death is therefore affirmed.

FACTS AND PROCEDURAL HISTORY

The facts of this crime were adequately set forth in this court's previous decision, wherein defendant's conviction was affirmed. *State v. Dunn, 01-1635 (La. 11/1/02), 831 So. 2d 862.* Insofar as they are

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* Retired Judge Philip C. Ciaccio, assigned as Justice ad hoc, sitting for Chief Justice Catherine D. Kimball.

pertinent to both the question of whether defendant is mentally retarded and to this court's capital sentence review, the circumstances of the crime are as follows:

> On June 4, 1998, the defendant borrowed a rental car from his girlfriend Leola Steward and picked up Kendall Breaux and Anthony Scott in Garyville, Louisiana. The three then went to Napoleonville. The defendant drove past the Iberville Bank to a convenience store where the trio purchased soft drinks. They then returned to the bank shortly before noon. Defendant parked the car in a handicapped parking space, and he and Scott entered the bank. There were two employees in the bank at the time. Lisa Dupuis, age 22, was behind the teller counter and 31 -year-old Jacqueline Blanchard was seated at a desk near the front door. The bank surveillance camera documented the defendant and Scott entering the bank at approximately 11:40 a.m. The tape shows Ms. Dupuis conducting a written transaction for the defendant. While she filled out the document, defendant left the bank and walked back to the car where Breaux was waiting. Defendant handed Breaux a pager and instructed him to enter the bank in 30 seconds. Defendant then walked back into the

bank and aimed a 9mm handgun at Ms. Dupuis.

There were no other eyewitnesses in the bank at the time, but the bank's surveillance camera captured the initial stages of the robbery as it unfolded. As soon as he reentered the bank, the defendant pulled out a 9 mm handgun and aimed it at Ms. Dupuis. At the same time, Scott pulled out a large revolver and aimed it as Ms. Blanchard. While Scott forced Ms. Blanchard to stand, defendant vaulted over the customer counter and grabbed Ms. Dupuis from behind. Scott forced Ms. Blanchard to walk to the teller area where Dunn was holding Ms. Dupuis at gunpoint. The two men began removing money from the cash drawers while still pointing their weapons at the women. Scott and the defendant then forced both women into a side office. Although there were no video cameras in the office, the lobby camera captured some of this activity. Breaux then entered the bank carrying a Prestone Anti-Freeze container filled with gasoline and began to douse the bank lobby with it. Ms. Blanchard appeared to be praying, while Ms. Dupuis stood behind her. At that point, the video equipment was pulled from the wall, interrupting the recording.

A bank customer, Earline Simoneaux, arrived at the drive-up teller window at the same time and noticed that the blinds were drawn, but the slats were open. She peered through the slats and saw two black males running out of the side office. Ms. Simoneaux testified that just as she started to ring the teller call button and just after the two black males bolted through the front door of the bank, she heard a gunshot, and then moments later, two more gunshots. She then saw a black male wearing a white cap run out of the office. He glanced back at her as he ran. Ms. Simoneaux then drove to the side of the bank where she saw a green Pontiac Sunfire drive out of the parking lot. She attempted to follow the car, but once the police arrived, she returned to report what she had seen. Ms. Simoneaux was certain that the defendant, who was wearing a white hat, had been the perpetrator. He was the one who had fired the shots after the other two black males had left the bank.

Assumption Parish Sheriff's Deputy Michael Brown responded to the bank alarm. As he drove towards the bank he saw a green Pontiac exit the parking lot. Expecting a false alarm, he approached the front door, opened it, and noticed a strong odor of gasoline. He did not see the tellers so he announced his

presence. He got no response, but heard a gurgling sound coming from the side office. As he approached he saw Jacqueline Guillot Blanchard lying face down in a pool of blood gasping for breath. He saw Lisa Dupuis' legs, and looked behind the teller counter and saw her lying in a pool of blood as well. He ran back outside to call for additional officers and an ambulance. He re-entered the bank and noticed Ms. Blanchard attempting to breathe. He checked Ms. Dupuis for a pulse and determined that she was dead.

Ms. Blanchard was moved to the lobby when the ambulance arrived. She died on the way to the hospital. Further investigation revealed that both women were shot multiple times in the head and upper body. Bullets and empty casings that matched the defendant's 9 mm weapon were found under and around the victims' bodies. Police found gasoline on Ms. Blanchard's desk, the teller counter, and in areas inside the office. The video equipment along with a total of $ 16,615.00 in cash was missing from the bank.

Ms. Simoneaux returned to the bank and gave police a description of the car and the defendants. At that point police put up roadblocks throughout the parish. Two deputies attempted to stop a vehicle fitting the description at a

> roadblock in Ascension Parish. The defendants drove through the roadblock at high speed. As they rounded a curve, the vehicle, driven by the defendant, drove directly into a train which was passing on nearby railroad tracks perpendicular to the highway. Uninjured, the defendant and Scott jumped out of the front of the car and fled. A foot chase ensued.
>
> Kendall Breaux exited the back seat of the car and attempted to run away but was captured by police at the scene of the crash. Defendant and Scott were captured in a sugar cane field about two miles away. All of the money, the video equipment and both weapons were found. Some items were found in the vehicle while other items were found in the cane field where Scott and defendant were hiding.

Dunn, 01-1635 at 2-4, 831 So. 2d at 865-66.

In March, 1999, defendant James Dunn was found guilty of first degree murder for killing Jacqueline Guillot Blanchard and Lisa Ann Dupuis. Following the penalty phase hearing, the jury sentenced the defendant to death on each count after finding two aggravating circumstances: 1) the offender was engaged in the perpetration or attempted perpetration of an armed robbery; and 2) the offender knowingly created a risk of death or great bodily harm to more than one person.

Defendant appealed his sentence and conviction to this court. On original appeal to this court, both the state and the defense argued the issue of the defendant's mental status based on the testimony from the original trial. Subsequent to the submission of briefs on the appeal, but prior to this court's ruling, the United States Supreme Court held the execution of mentally retarded persons violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002).* This court affirmed defendant's conviction, but because evidence of possible mental retardation was presented at the penalty hearing for mitigation purposes only, this court could not resolve the issue definitively, although it found "reasonable ground to doubt whether defendant is mentally retarded." *State v. Dunn, 2003-0821 (La. 5/9/03), 847 So. 2d 1183.* [1] While affirming the defendant's convictions for first degree murder, this court pretermitted Rule 28 review of the penalty phase and remanded the case to the district court for a hearing on defendant's [Pg 5] mental status. *State v. Dunn, 01-1635, pp. 27-31 (La. 11/1/02), 831 So. 2d 862, 884-888.*

The trial court thereafter appointed an independent panel of experts, consisting of Dr. Alicia Pellegrin, accepted as an expert in clinical psychology, Dr. Charles P. Vosburg, accepted as an expert in forensic psychology, and Dr. David Hale,

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[1] This conclusion was based in part on the uncontradicted testimony of Dr. Marc Zimmerman, hired by defendant's trial counsel, that defendant is mildly mentally retarded and suffers from "a pervasive pattern of brain dysfunction."

accepted as an expert in the field of clinical psychology and clinical neuropsychology, to examine defendant. In addition, defendant also presented his own expert, Dr. Drew Gouvier, who was qualified as an expert in psychology and neuropsychology. A hearing was held on several dates in October and November, 2008, before the Hon. Alvin Turner, and the trial court subsequently found defendant not mentally retarded. Defendant has appealed that determination to this court, and because we find no error in the trial court's ruling that defendant is not mentally retarded and therefore not exempt from capital punishment, Rule 28 review of defendant's sentence is also now before the court.

DISCUSSION

The American Association on Mental Retardation (AAMR) [2] defines mental retardation as follows:

> *Mental Retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional

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[2] Dr. Gouvier, defendant's expert, testified at the *Atkins* hearing that the American Association of Mental Retardation has since changed their name to the American Association on Intellectual and Developmental Disabilities ("AAIDD").

academics, leisure, and work. Mental retardation manifests before age 18. Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992). [3]

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[3] It should be noted that in 2002, the American Association on Mental Retardation published a tenth [*11] edition of *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002), which contains a conceptually similar but revised definition of mental retardation. It provides as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.
>
> The following five assumptions are essential to the application of this definition:
>
> 1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
>
> 2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
>
> 3. Within an individual, limitations often coexist with strengths.
>
> 4. An important purpose of describing limitations is to develop a profile of needed supports.
>
> 5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

Atkins v. Virginia, 536 U.S. 304, 308, 122 S. Ct. 2242, 2245, n.3, 153 L. Ed. 2d 335 (2002). The American Psychiatric Association ("APA") provides a similar definition as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of

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Id. at 13.

The American Association on Intellectual and Developmental **[*12]** Disabilities ("AAIDD"), formerly AAMR, recently published an eleventh edition of the aforementioned book, entitled *Intellectual Disability: Definition, Classification, and Systems of Support* (11th ed. 2010), which presents its first official definition of the term "intellectual disability," formerly mental retardation. AAIDD defines "intellectual disability" using an identical definition as that set forth in the tenth edition above; however, it removes all reference to "mental retardation," replacing the term with "intellectual disability."

> various pathological processes that affect the functioning of the central nervous system. Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 536 U.S. at 308, 122 S. Ct. 2242 at 2245, n. 3 (2002).

Similarly, *La. C.Cr.P. art. 905.5.1(H)(1)* provides a concurrent definition to those provided by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the APA:

> "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

As previously mentioned, the United States Supreme Court in *Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002)*, held the execution of mentally retarded individuals is excessive under the *Eighth Amendment* and does not measurably advance the deterrent or the retributive purpose of the death penalty. *Id, 536 U.S. at 321, 122 S. Ct. at 2252. Atkins* was based on the "evolving standards of decency" that have occurred since the

Supreme Court's decision in *Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)*, allowed the execution of a mentally retarded defendant. *State v. Williams, 01-1650 (La. 11/1/02), 831 So. 2d 835.* In *Atkins*, the Supreme Court found the deficiencies of the mentally retarded do not exempt them from criminal sanctions, but do diminish their personal culpability, as they are far more likely to act on impulse rather than premeditation, and in a group setting they are more often followers than leaders. *Id., 536 U.S. at 318, 122 S. Ct. at 2250.* The *Atkins* court reiterated one of the purposes of capital punishment is to deter offenders who act with premeditation and deliberation. *Id., 536 U.S. at 319, 122 S.Ct. at 2251.* Because a mentally retarded offender acts on impulse and not premeditation, the intended deterrent effect of the punishment fails to serve its purpose. *Id.* Additionally, the Court stated:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable-for example, the diminished ability to understand and process information, to learn from that experience, to engage in logical reasoning, or to control impulses-that also make it less likely that they can process the information of the

> possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

Id. 536 U.S. at 320, 122 S. Ct. at 2251.

With respect to retribution, the Court found the severity of the punishment imposed depends on the culpability of the offender. *Id.* Thus, given the reduced culpability of a mentally retarded offender, the imposition of the death penalty would be inappropriate. *Id.*

Although the *Atkins* court rejected the notion of imposing capital punishment on mentally retarded offenders, it reiterated its approach in *Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986)*, with regard to insanity, as leaving "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins, 536 U.S. at 317, 122 S. Ct. at 2250* (quoting *Wainwright, All U.S. at 405, 416-417, 106 S. Ct. 2595*). As such, several months after the Supreme Court issued *Atkins*, this court set forth the procedure to be followed by courts in

Louisiana, in *State v. Williams, 01-1650 (La. 11/1/02), 831 So. 2d 835.*

In *Williams*, while affirming the conviction of the defendant for first degree murder, this court remanded the case to the trial court for an evidentiary and contradictory hearing before a judge on the issue of the alleged mental retardation of the defendant, and instructed the trial court to treat the issue procedurally as a pretrial competency hearing. *Williams, 01-1650, p. 29 (La. 11/1/02), 831 So. 2d 835, 858.* Furthermore, *Williams* instructed that the procedure should be appropriately modified when necessary to address the particulars of assessing mental retardation. *Id.* This court also noted that instead of physicians, experts with the appropriate expertise to diagnose mental retardation shall be utilized. *Id., at 30, 831 So. 2d at 859.* Additionally, this court stated the State and the defendant maintained the right to an independent medical examination by an expert of their choice. *Id.* However, the *Williams* court noted the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts. *Id.*

The defendant has the burden to come forward with some evidence initially to put his or her mental condition at issue. *State v. Dunn, 01-1635, p. 26 (La. 11/1/02), 831 So. 2d 862, 884.* Furthermore, this court in *Williams* adopted the preponderance of the evidence standard, whereby defendant must prove his or her mental retardation by a preponderance of the evidence. *Id. at 31, 831 So. 2d at 859.*

Shortly after the issuance of both *Atkins* and *Williams*, the Louisiana Legislature enacted *La. C.Cr.P. art. 905.5.1*, which codified the procedure for determining whether an offender is mentally retarded. It states in pertinent part:

> (C)(1) Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.

La. C.Cr.P. art. 905.5.1(C)(1).

Prior to the scheduled *Atkins* hearing in the trial court, the defendant filed a motion for a jury trial, arguing he was entitled to a jury determination of his mental retardation, and/or a new sentencing hearing pursuant to *La. C.Cr. P. Art. 905.5.1.* The trial court granted the defendant's motion for jury trial, but denied the motion for a new sentencing. However, this court vacated that judgment, finding *La. C.Cr.P. art. 905.5.1* inapplicable to the instant case, as the article specifically provides the issue of mental retardation must be raised pretrial by the defendant, and requires that the jury try the issue during the capital sentencing hearing. *State v. Dunn,*

07-878, p. 6 (La. 1/25/08), 974 So. 2d 658, 662. Consequently, this court found the statutory requirements in *905.5.1* clearly could not be accomplished in a matter that is remanded post-trial and post-sentencing for an *Atkins* hearing. *Id.* This court therefore ordered the procedure in *Williams* to be used to conduct an *Atkins* hearing where the question of mental retardation arises post-verdict. *Id. at 663.*

The Atkins Hearing

As noted above, the generally accepted definition of mental retardation includes significant subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and which must manifest during the developmental stage. Concerning the first prong, the Weschler scales and the Stanford-Binet are the two most common instruments utilized to assess intelligence, or intellectual quotient ("I.Q."). *Mental Retardation: Definition, Classification, and Systems of Supports 59* (10th Ed. 2002). *See also, State v. Williams, 01-1650, p. 23 (La. 11/2/02), 831 So. 2d 835, 854, n. 26.* Both maintain a mean IQ score of 100, but the Wechsler scale uses a standard deviation of 15 and the Stanford-Binet a standard deviation of 16 in arriving at scores that indicate less than (or greater than) average intelligence. *Mental Retardation*, at 61 -62. However, the most recent Stanford-Binet 5 test has a standard deviation of 15. *Contemporary Intellectual Assessment: Theories, Tests and Issues* 325 (Dawn P. Flanagan & Patti L. Harrison eds., 2005). In the 2002 AAMR system, the "intellectual functioning" criterion for diagnosis of mental

retardation is approximately two standard deviations below the mean. *Mental Retardation*, at 58. Consequently, a person scoring two standard deviations below the mean would have an I.Q. of 70 on the Weschler scale and an I.Q. of 68 using the Stanford-Binet scale.

Dr. Drew Gouvier, defendant's own expert, was the first to testify concerning the defendant's I.Q. Dr. Gouvier administered the Stanford-Binet 5 test to the defendant in November, 2006, and reported defendant's full scale I.Q. as 70, [4] with an adjustment for the "Flynn Effect" to a score of 69. The Flynn Effect, named for James Flynn, a political scientist, is a theory which attributes the general rise of I.Q. scores of a population over time to the use of outdated testing procedures, emphasizing the need for the repeated renormalization of I.Q.-test standard deviations over time. *In re: Robert Madrid Salazar, 06-10243 (U.S. 5th Cir. 3/17/06), 443 F.3d 430, 434.*

In an article authored by Flynn, he explains his analysis to determine whether significant gains in I.Q. scores were taking place over time. The scoring data was provided by the publishers of the Wechsler and Stanford-Binet tests, and in each instance, the publishers gave the same test subjects two tests, which had been "normed" [5] several years apart.

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[4] Dr. Gouvier testified that in order to determine if defendant was setting forth good effort during the test, he administered the "Test of Memory Malingering." According to Dr. Gouvier, defendant's scores on this test were within normal limits.

[5] Traditional normative standard scores are used to compare the examinee's performance to age-level peers from

James Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect, 12 Psych., Pub. Pol, and L. 170, 176 (2006).* Flynn then divided the gain in I.Q. scores by the number of years that separated the norming of the two tests. *Id.* This process provided him with twelve estimates of the rate of I.Q. gains over time from 1972 until 2002. *Id.* Flynn then averaged those twelve estimates to reach a rate of gain of .3 points per year since the test was normed. *Id.*

As noted above, Dr. Gouvier applied the Flynn Effect to defendant's I.Q. score in this instance one point downward to reach a score of 69, using the Stanford Binet's publication date of 2003 to reach this corrected score. Defendant's adjusted score of 69 places it two standard deviations below the norm, which places defendant in the range for mental retardation. However, as Dr. Gouvier noted himself in his testimony, there is no way to determine a true I.Q. score. As such, it is generally accepted that a properly administered test should provide a 95% confidence level that the score obtained is the subject's I.Q. within a five point range. This means the defendant's actual score could be anywhere from 64 to 74. [6]

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the nationally representative norm sample. *Contemporary Intellectual Assessment: Theories, Tests and Issues* 331 (Dawn P. Flanagan & Patti L. Harrison eds., 2005). Furthermore, "[t]he great utility of standardized, norm-referenced tests is the ability to make comparisons of performance that are valid and provide information regarding relative standing among a peer group." *Id.* at 552.

[6] It is important to note before the defendant's penalty phase hearing in 1998, his trial counsel hired Dr. Marc Zimmerman to test his intelligence for possible use as

Dr. David Hale, one of the court appointed panel of experts, also administered an I.Q. test to the defendant, in November of 2004. Dr. Hale administered the WAIS-III test, along with several other tests which demonstrated defendant was exhibiting a mild degree of depression and a moderate degree of anxiety. [7] Dr. Hale testified the result of the WAIS-III test was an I.Q. of 78, which he further reduced to 75 after accounting for the Flynn Effect. A score of 75 gives a 95% confidence level the defendant's I.Q. is between 70 and 80.

In April, 2007, Dr. Alicia Pellegrin also administered the WAIS-III to the defendant for a second time. [8] Dr. Pellegrin initially reported the

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mitigation evidence during the (*pre-Atkins*) penalty phase at trial. Dr. Zimmerman used the Kaufman I.Q. test. While Dr. Zimmerman did not testify at the *Atkins* hearing in this matter, Dr. Gouvier reviewed the data from that test and testified it was administered correctly. The defendant scored 71 on that test, which translates to a score of 69.5 when the Flynn Effect is applied. With a range of 64.5 to 74.5, the defendant would be on the borderline of mental retardation and low intellectual functioning.

[7] Similar to Dr. Gouvier, Dr. Hale administered different tests to the defendant during the I.Q. examination to determine if defendant was providing his full effort. Based upon the results of these tests, Dr. Hale opined similarly that defendant was performing at the highest level during the testing.

[8] On cross examination, Dr. Pelligrin was questioned about what, if any, "practice effect" the defendant could have had as a result of taking the same I.Q. test within approximately two years of each other. Dr. Pelligrin testified she believed it was appropriate to administer this test to defendant, as it had been almost three years since the last test and there is no data to support that it is not appropriate to give the same I.Q. test, as long as it is not within the first year.

defendant's I.Q. score as 75, but later amended that score to raise it by three points to 78. Dr. Pellegrin testified the reason for the amendment was an error in the initial manual scoring that was later corrected by computer scoring. Concerning a reduction for the Flynn Effect, Dr. Pellegrin, while acknowledging the existence of the theory, was reluctant to apply it to the defendant's score because she felt there was still disagreement as to the exact number the score should be reduced. Without the application of the Flynn Effect, Dr. Pelligrin testified defendant's I.Q. score ranges from 73-82. However, despite her reluctance to apply the Flynn Effect, Dr. Pelligrin opined the defendant's score in this instance should be reduced by three points because of the serious consequences involved. Such a reduction would bring the defendant's score to 75, with a range of 70-80. [9]

As discussed above, the second prong of the definition of mental retardation is that the individual must have substantial deficiencies in adaptive functioning. The American Psychiatric Association states adaptive functioning "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Diagnostic and Statistical Manual of Mental Disorders* IV, 42 (4th ed. 2000). This court in *State v. Williams, 01-1650, pp. 23-24*

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[9] Dr. Pelligrin also attempted to administer an adaptive functioning test to a shift supervisor at the jail which housed defendant, but because of the officer's specific lack of knowledge concerning the defendant, a valid score could not be obtained.

(La. 11/1/02), 831 So. 2d 835, 854, noted six major life activities related to adaptive functioning: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

In determining defendant's adaptive functioning, Dr. Gouvier administered the Adaptive Behavior Assessment System ("ABAS"), which is performed by collecting information from individuals who are familiar with the subject's living skills, such as family members, a supervisor, or care provider. The test evaluates the subject's adaptive functioning in ten skill areas including communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction, social, and work. For his evaluation, Dr. Gouvier chose the defendant's older brother by eleven months, Lester Dunn, Jr., and Michael Mariani, the defendant's supervisor at New Orleans City Park while the defendant was incarcerated [10] at Jackson Barracks between 1992 and 1994. [11]

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[10] In 1984, defendant was charged with the murder of Lt. Sherman Walker, Chief of Detectives, St. John Parish Sheriff's Department, but later pled guilty to manslaughter. Defendant was sentenced to twenty-one years imprisonment at hard labor, but was released on parole after ten and one-half years. He was to complete parole in 2006.

[11] Dr. Gouvier testified he also administered the ABAS to the defendant James Dunn in November of 2006 at Angola, reporting a score in the low 80s. However, Dr. Gouvier testified the defendant overestimated his own skill set in reporting on the ABAS, resulting in the higher score. Dr. Gouvier also testified the defendant himself reported he was weak in the areas of social, work, and health and safety.

Dr. Gouvier administered the ABAS to Lester Dunn, Jr., in March, 2007, over the telephone. Dr. Gouvier focused his interview with Lester on Lester's experience with his brother prior to the defendant's 1985 incarceration, as after that time period, Lester was only briefly in Tennessee with the defendant, due to Lester's transfer to Germany with the military shortly thereafter. Based upon Lester's answers, Dr. Gouvier testified the defendant received a score of 69, demonstrating that just before the defendant turned eighteen, he was substantially impaired in adaptive skills. Although Dr. Gouvier did not testify concerning the specifics of Lester Dunn's answers on the ABAS, Lester himself testified at the *Atkins* hearing regarding his perception of the defendant's living skills.

Lester testified the defendant earned mostly D's and F's in school and that he was put in "special" or "slower" classes, although they were not noted on school records as any type of traditional "special education" classes. Lester further testified he often helped defendant with his homework because it was "always challenging" for him. Although Lester planned on joining the military after high school graduation, he testified defendant never had a plan for his time after high school. On cross examination, the state questioned Lester on the correlation between failing grades in school and mental retardation. Lester testified that he, as well as the defendant, received mostly poor grades in school, and they were both required to repeat a couple of grades. Despite having a similar school record as his brother James, Lester testified he did not believe himself to be retarded.

Lester also testified the defendant did not enjoy reading and recalls defendant mostly reading comic books or pictorial material. Lester testified as well even after defendant was released from his first incarceration, he was not able to use the newspaper to look for jobs in the classified section.

Lester stated at the hearing defendant's hygiene as a child was poor, testifying defendant did not brush his teeth regularly and infrequently bathed. Further, Lester noted defendant was sent home from school several times for defecating on himself, and was the subject of much teasing at the hands of defendant's siblings (besides his brother, Lester, defendant has two sisters). On cross-examination, however, the State pointed out the defendant's school records do not indicate he was ever sent home for any hygiene related issues.

Lester stated on direct examination defendant did not cook for himself, did not clean the house or do laundry, and had no hobbies. According to Lester, defendant never obtained a checking account, preferring to deal with cash. Lester testified as well he recalled defendant being a "follower" and generally associating with individuals younger than he.

On cross-examination, the State challenged Lester's assertion the defendant did not have hobbies during his childhood. The State noted both the defendant's mother and sister testified the defendant enjoyed go-karts and would take them apart and put them back together. [12] Lester testified

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[12] Lester did testify that his mother, Joanne Dunn, suffers from increasing dementia in recent years, and

that while he agreed his brother enjoyed go-karts as a child, he did not remember defendant working on them mechanically. When asked about the defendant's own assertion that he was "a body and fender guy" and that he worked as an auto body mechanic from the age of 16 until he was first incarcerated, Lester stated the defendant often overstated his abilities. Lester acknowledged he and his brother worked at their uncle's auto shop as teenagers, but they were not allowed to work on the cars. The State also presented records indicating the defendant was assigned to work in the auto body shop during his first incarceration. Lester testified he felt his brother was capable of doing such work, but to his knowledge, he never had. On re-direct examination, the defense introduced Department of Corrections documents which indicated the defendant was moved from the mechanic shop to work in the service station less than one year after beginning work. However, the record is not entirely clear as to the reason for the move.

On direct examination, Lester Dunn testified he did not believe the defendant was capable of living independently. Specifically, he stated he felt the defendant would be incapable of moving out on his own and obtaining employment, paying bills, and generally supporting himself without assistance. On cross examination, however, Lester acknowledged

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consequently, her testimony could be viewed as suspect. Additionally, Dr. Gouvier also administered an adaptive skills to Ms. Dunn. While he was able to obtain a score of 54, he testified this result was not reliable because of her dementia. According to Dr. Gouvier, during the test Ms. Dunn had difficult answering questions and was frequently distracted.

that his brother lived independently with Opal Lenox for a year and a half, and at no time during that period did Lester assist his brother with any daily functions such as grocery shopping, reading, writing, dressing, or bathing. Also on cross examination, the State questioned Lester on statements he made during the defendant's penalty phase hearing where he described the defendant as "normal." Furthermore, the State noted Lester did not raise any of the issues he previously testified about at the instant hearing, such as defendant's poor hygiene or his tendency to be a follower. Lester attempted to clarify his previous testimony, indicating he considered his family to be normal growing up, but was not necessarily commenting on his brother's intellect.

The State also questioned Lester about a car that he now possesses, which the defendant had purchased from Opal Lennox after he was released from jail. Although Lester had in the past helped defendant purchase a car, Lennox testified defendant purchased the second car without assistance from anyone, completing all necessary paperwork on his own. The defendant was also able to obtain a Tennessee driver's license following his release from his first incarceration. [13]

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[13] During his testimony, Dr. Gouvier noted Lester mentioned some of the information contained in Lester's testimony while he was administering the adaptive skills test. Specifically, Dr. Gouvier stated Lester told him about the defendant's incontinence problems. Lester stated this problem lasted until the sixth grade, but when defendant became interested in girls he began to improve his hygiene. Dr. Gouvier testified that while information such as this is not used to obtain the actual test score, it is used to flesh out the results.

In April, 2007, Dr. Gouvier also administered the ABAS to Michael Mariani, who was the defendant's supervisor at New Orleans City Park from 1992 through 1994. Since acting as his supervisor, Mariani maintained some contact with the defendant as Mariani's son played basketball with the defendant, and Mariani served as a mentor to the defendant. Through his testing with Mariani, Dr. Gouvier obtained a score of 65, which Dr. Gouvier testified is two and one-third standard deviations from the mean and indicates a significant impairment in adaptive functioning. Dr. Gouvier testified Mariani was a supervisor in the maintenance department of the park and the defendant was assigned to do jobs associated with the upkeep of the park. All work was closely supervised with no independent projects involving tools. Mariana told Dr. Gouvier the defendant "had to be led a lot" and he was only left alone if it was "something that could be screwed up." However, on cross examination Dr. Gouvier admitted the DSM-IV suggests a tester should gather information from one or more reliable independent sources concerning the defendant's deficits or strengths in adaptive functioning in the developmental stage, yet Dr. Gouvier stated he had no such sources. Dr. Gouvier also testified on cross examination that he saw no indications in his review of the defendant's life instances in which he had been overcome by an irresistible impulse or had diminished capacity to control impulses, a common characteristic of mentally retarded individuals. Furthermore, on cross examination, Dr. Gouvier testified he was not

aware of the details of the crime in this matter, specifically, that defendant acted as the leader in planning and executing the crime. Dr. Gouvier admitted the behavior of the defendant during the commission of this crime "could have added additional information." [14]

Dr. Charles Vosburg was appointed by the court to the *Atkins* panel to test the defendant's adaptive functioning. Dr. Vosburg chose a similarly accepted adaptive skills instrument called the Vineland Adaptive Behavior Scale, which he administered to defendant's brother, Lester Dunn, and Mike Arabie, the defendant's probation officer for approximately three years after release from his first period of incarceration.

Dr. Vosburg interviewed Mr. Arabie in December of 2004, and based upon this interview, determined the defendant's daily living skills and socialization coping skills to be adequate. Arabie, however, did not have knowledge of and did not wish to offer comments on defendant's interpersonal relationships or his play and leisure time. Also based upon his interview with Arabie, Dr. Vosburg determined defendant was deficient in his written communication skills. Similarly, Dr. Vosburg's interview with Lester Dunn in April of 2005 demonstrated the defendant's deficiency in expressive communication. Dr; Vosburg also found through his interview with Lester Dunn that

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[14] On cross examination, Dr. Gouvier testified he believed it was possible for defendant to have committed these acts, despite his being mentally retarded, as this could have represented a "peak of function" for him.

defendant was not deficient in receptive communication skills, nor was he deficient in daily living or socialization skills. Based upon the answers given by Lester Dunn, Dr. Vosburg obtained an adaptive behavior composite score of 79 for the defendant, or above the range for a mentally retarded person.

In his evaluation of defendant, Dr. Vosburg also reviewed the I.Q. data collected by Dr. Hale, as well as the examination performed by Dr. Zimmerman before the penalty phase hearing. Dr. Vosburg noted Dr. Zimmerman, who interviewed only the defendant, found similar deficiencies in the defendant's communication skills as well as in some living skills areas, such as cooking and shopping. Overall, however, there was no significant deficit in defendant's adaptive behavior. Further, Dr. Vosburg reviewed the defendant's school records and found nothing to support a diagnosis of mental retardation. The defendant's work records from his employment as a forklift operator also showed no sign of deficient adaptive functioning or mental retardation, and in fact, during his employment, defendant was graded highly by his supervisor. Dr. Vosburg testified that in order for defendant to operate machinery such as a forklift, it would require him to have adequate adaptive functioning. [15] Based upon all the

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[15] The testimony of Dr. Vosburg represents the most complete information concerning defendant's work history. Although he did not elaborate on the source of his information or about which employee evaluations he reviewed, Dr. Vosburg stated at the hearing:

[T]he work record was connected to when he was released from prison and, again, to work in this local area like I think there was a bottling plant that he worked at, maybe two different bottling plants. If my memory serves me correctly, certainly one of these was in excess of one year's time period that he worked.

And, also, I reviewed some supervisor ratings of his behavior, of his work performance, and like wanting to continue to hire him. I think there was a layoff ultimately. Some of the data that I reviewed also indicated that in addition to working as a laborer and a line worker in a bottling plant, he also operated a forklift.

* * *

I would think that when you begin to operate machinery such as that, that does take some skill and some ability to address safety standards, some degree of complication is what I'm trying to say, rather than just a line worker or a laborer position. It's a little bit more sophisticated.

State: And safety and health and things like that are also considerations that you look at in determining levels of adaptive behavior; is that correct?

Dr. Vosburg: Correct.

* * *

State: There was no indication in those work records from the supervisor who actually wrote notes on his assessment that Mr. Dunn seemed to be impaired in any way is there?

Dr. Vosburg: I saw nothing of that.

Based upon the testimony elicited at the hearing and information contained within defendant's pre-sentence report,

information reviewed by him, Dr. Vosburg concluded the defendant's adaptive skills were above the mental retardation range.

On appeal, defendant asserts in brief he is mentally retarded, supported not only by Dr. Gouvier's testimony, but also due to several alleged problems with Dr. Vosburg's test scores. More specifically, defendant argues one of Dr. Vosburg's informants, Mike Arabie, did not have sufficient knowledge regarding defendant's adaptive functioning to obtain a valid score. Furthermore, defendant contends Dr. Vosburg incorrectly interpreted an instruction in the Vineland Manual. The instruction from the manual states: "If five or more [don't knows] are scored in a domain, do not obtain derived scores for this domain or its subdomains." The defendant avers the large number of "don't know" answers provided by Arabie in the daily living and socialization domains, specifically the subdomains of interpersonal relationships and leisure time, invalidated the scores for those domains and invalidated the composite score for the entire test. Dr. Vosburg discounted the subdomain scores in which Arabie was unable to answer a sufficient number of the questions, but still obtained a score for the domain as a whole, based on the scores from the subdomains with which Arabie was familiar. The defendant asserts the only valid

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defendant was employed at Elmwood Marine, a ship building and repair company, ConStar, a bottling company, and Southern Beverage, a beverage distributor. As part of his duties, it appears the defendant operated a forklift during at least one of these jobs, although the record is not entirely clear as to where defendant had this responsibility.

domain score is from communication, where the defendant received a score of 60, more than two standard deviations below the mean. The defendant avers all other reported scores should not be considered because of Arabie's lack of familiarity with the defendant in those areas.

The defendant also argues Dr. Vosburg failed to score the tests administered to Arabie and Dunn properly, making the reported results questionable. Each question in the Vineland test should receive a score of "zero", "one", or "two." A "zero" means the test subject does not have that particular skill; a "one" means the subject may have that skill or is developing it, but the subject does not always demonstrate it; and "two" means the subject has the skill and uses it. Of the 220 questions on the Vineland test, there were no scores of "one" in the test given to Lester Dunn and only three in the test given to Arabie. The defendant also notes one of these scores of "one" was for a question that required an answer of either "zero" or "two."

The defendant further questions the validity of the scores obtained from the test administered to Lester Dunn based on several notations by Dr. Vosburg. Question 56 asks whether the subject "reads books of at least fourth grade level." The defendant received a score of "two," indicating he does read at a fourth grade level and regularly does so. In his notes, however, Dr. Vosburg noted Lester Dunn told him the defendant did not read anything that required comprehension, and only read comic books or magazines with pictures. The defendant received a score of "two" for the question asking whether he had a hobby, despite a notation from Dr.

Vosburg stating Dunn told him he did not think the defendant had any hobbies. Finally, question 58 asked if the test subject "watches television or listens to the radio for practical, day-to-day information." Again Dr. Vosburg scored the question as a "two" even though Lester stated the defendant did not watch or listen to the news or similar programs. Based upon these irregularities, the defendant asserts the score from Mike Arabie should be completely discounted and the score from Lester Dunn should at least be viewed with suspicion.

In its brief, the State asserts the sole issue before this court is whether the defendant met his burden of proof to establish he is mentally retarded and therefore exempt from capital punishment. The State points to evidence establishing defendant did not meet his burden of proof, most specifically calling into question Dr. Gouvier's diagnosis. Dr. Gouvier only reviewed school records of the defendant prior to age eighteen, where those records showed no diagnosis of mental retardation, no placement in "special education" classes, and no indications of the defendant's absence from school due to hygiene problems. Furthermore, testimony was elicited at the hearing that defendant did initiate conversations with others, and was described as a "self starter." During defendant's first incarceration, the defendant received discipline for an infraction, and thereafter did not receive further discipline, indicating he learned from his mistakes. The Department of Corrections documents also indicated defendant has been evaluated by mental health professionals during his present incarceration, with no complications or issues recorded. More specifically,

defendant has been described as having "tight, goal-directed thinking and behavior."

The State noted Dr. Vosburg's testimony, where he also emphasized the lack of any mental retardation diagnosis prior to the age of eighteen, as well as defendant's good work records. Furthermore, concerning the alleged irregularities with Dr. Vosburg's scoring of the Vineland test administered to Lester Dunn and Mike Arabie, Dr. Vosburg testified he ruled out the domestic sub-domain for too many "DK's," indicating he scored the test correctly. Dr. Vosburg also testified that while the "Flynn Effect" may be an accepted theory used to adjust I.Q. scores, it is not an absolute in psychology (as also noted by Dr. Pelligrin during her testimony). For these reasons, the State asserts defendant has failed to meet his burden of proof to show he is mentally retarded and not subject to capital punishment.

Analysis

As discussed above, the defendant is required to show by a preponderance of the evidence he is mentally retarded, and therefore, not subject to the death penalty. Allocation of the burden of proof to the defendant on the issue of mental retardation is crucial under *Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002)* because the decision exempts all mentally retarded persons from execution and over 80% of mentally retarded persons fall within the classification of mild mental retardation. DSM-IV at 43. Within that large class, *Atkins* may require a fact finder to make exceedingly fine distinctions between those persons who are

exempt from capital punishment and those who are not because mildly mentally retarded persons are capable of working and living on their own just as persons of borderline intelligence. DSM-IV at 43. ("During their adult years, [individuals with mild mental retardation] usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.") In fact, mild mental retardation is not a fixed or static condition, particularly if it is not influenced by an underlying general medical condition *(e.g.*, Down Syndrome). Thus, a person classified as mildly mentally retarded at one point in his or her life may not fall within that classification at a later point in life, a development heavily influenced by environmental factors. DSM-IV at 47. ("Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation.")

For that reason, "[d]ifferentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information." DSM-IV at 48. That cautionary note for clinical practitioners and diagnosticians applies far more forcefully in a

forensic context for Eighth Amendment purposes of distinguishing those persons who are exempt from capital punishment and those who are not.

In this instance, four experts, along with lay witnesses, testified at the *Atkins* hearing, and between those four experts, three I.Q. tests and two adaptive functioning tests were administered. While the results were not overwhelmingly conclusive in either direction, the majority of the tests indicate the defendant suffers from low intellectual functioning as opposed to mental retardation.

As discussed previously, I.Q. scores are not exact and represent a range, generally considered to be five points in either direction, in which the actual score falls. Even within said range, there is still only a 95% confidence level the subject's true I.Q. is represented. As part of the representation for the *Atkins* hearing, the defendant was tested three times, and received I.Q. scores of 69, 75, and 75. [16] The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis; however, it is possible for someone with

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[16] Concerning the application of the Flynn Effect, while it may be a theory utilized by certain practitioners, this court has not specifically accepted the theory as scientifically valid. Even reducing Drs. Hale and Pelligrin's I.Q. scores for defendant, their results still remain in the borderline range. (*See In Re: Robert Madrid Salazar, 443 F.3d 430, 433, n.1 (5th Cir. 2006)* "Even assuming that the Flynn Effect is a valid scientific theory and is applicable to Salazar's individual I.Q. score-and we express no opinion as to whether this is actually the case-Salazar's score readjusted to account for score inflation is still above the cutoff for mental retardation."). It is only when the Flynn Effect is applied to Dr. Gouvier's scores that they are reduced below the range for mental retardation.

an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired. Because of the defendant's borderline I.Q. scores, his diagnosis is heavily dependent on his adaptive functioning. *See* DSM-IV at 42 ("Impairments in adaptive functioning, rather than a low I.Q. are usually the presenting symptoms in individuals with Mental Retardation.")

Both Dr. Gouvier and Dr. Vosburg administered adaptive functioning tests to defendant in preparation for the hearing. Dr. Gouvier, defendant's expert, reported scores of 69 and 65 on the tests he administered to the defendant's brother, Lester Dunn, and defendant's former supervisor, Michael Mariani. Lester Dunn also personally testified at the hearing concerning defendant's adaptive skills; however, much of what he told the court could either not be confirmed or was contradicted by other evidence. Specifically, while Lester testified the defendant had been sent home from school as a child for defecating on himself, school records contain no indication of this ever occurring, nor do the records reflect any absences from school for lack [Pg 26] of personal hygiene. Lester also testified he did not believe the defendant was capable of living independently; however, testimony and other evidence showed defendant lived with a girlfriend for some time and further, was capable of dealing with all necessary paperwork and negotiation to purchase a car on his own. Moreover, employment records indicate the defendant was capable of filling out a job application and obtaining a job, in addition to being a reliable worker who received consistently positive reviews from his employers. He was

described as a self-starter who worked well with others and on his own. Defendant's employment as a fork-lift operator also reflected confidence in his adaptive skills. Additionally, the records introduced into evidence from the Louisiana State Penitentiary demonstrate defendant has been consistently evaluated during his incarceration at a "Level 5," indicating defendant is in no need of any mental health assistance. [17] [18]

Dr. Vosburg, one of the court appointed experts, also administered an adaptive functioning test to

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[17] Carroll Gilcrese, Mental Health Director for Louisiana State Penitentiary, testified at the hearing of this matter regarding the classification system of levels of care for inmates. Ms. Gilcrese testified defendant James Dunn has consistently received a Level of Care 5, indicating the defendant has no mental health problems or concerns. If he were identified as having a developmental disability, he would be classified as a Level 4. During his incarceration, defendant has only been classified as Level 5, and has never been classified as a Level 4.

[18] It is important to note the record does contain evidence that defendant has taken college-level classes during his incarceration through a program provided by Delgado Community College for which he may receive "good time" credits. However, testimony from Ms. Jeralynn Jessica Madere, former Assistant Dean in the Continuing Education at Delgado from 1989 to 1999, indicates the inmates are not required to have a high school degree or obtain a G.E.D. before enrolling in the classes, and she did not recall any inmate failing a course. Specifically, although Ms. Madere did not know defendant personally, she testified the program was designed to provide motivation to the inmates, and not reinforce negative experiences they may have had in the past. Consequently, we do not find defendant's participation in this program determinative as it relates to this court's decision in the instant matter.

Lester Dunn, obtaining a score of 79, which places defendant above the mentally retarded range. As discussed above, while defendant expresses concern about the scoring of several of the questions, reducing the score by several points to take into account any inconsistencies still results in a score above the mental retardation range. [19]

It is also important to consider the defendant's behavior during the planning and commission of the instant crime as it relates to his adaptive skills functioning. This court recognized in the appeal of his co-defendant, Anthony Scott, which also entailed a remand to resolve the question of whether he too is mentally retarded and so exempt from capital punishment, that "the defendant's behavior during and following the commission of the crime can be relevant to the determination of mental retardation." *State v. Scott, 04-1312, p. 85 (La. 1/19/06), 921 So. 2d 904, 959* (citing *State v. Brown, 03-0897, p. 46 (La. 4/12/05), 907 So. 2d 1, 32* ("Notwithstanding the fact that the defendant's experts failed to allege that he suffered from mental retardation, his claim is undermined by his display of an intact survival mentality, which Brown exhibited when he destroyed all trace evidence of his crime by burning his victims in his car. Further, he orchestrated the removal of the furniture and sanitizing of his house

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[19] Defendant asserts the test administered to Mike Arabie should be discounted, as it appears Dr. Vosburg did not appropriately adjust his scoring based on the number of "don't know" answers provided by Arabie. Even if this test were not to be considered, the absence of that score does not affect this court's finding that defendant has not met his burden of proof to establish mental retardation.

[and] successfully eluded police apprehension for 82 days.")) In the instant matter, the evidence at trial established defendant engaged in the leadership and planning of a major bank robbery, which included discussing the robbery with Kendall Breaux and Anthony Scott in advance, borrowing a rental car from his girlfriend, driving from St. John Parish to Assumption Parish to the bank, and obtaining and filling a gasoline can to bring to the scene of the crime in order to conceal commission of the crimes. Furthermore, defendant instructed his codefendants during the commission of the crime, including handing Kendall Breaux a beeper while Breaux was sitting in the waiting car, with the specific instruction to enter the bank in thirty seconds with the gas. Upon re-entering the bank, where Anthony Scott was filling out a money order, defendant and Mr. Scott brandished their weapons, and defendant jumped over the counter to detain Lisa Dupuis, a bank employee. Defendant also instructed Anthony Scott to remove the security video equipment, and shortly thereafter the two bank employees were murdered by the defendant. The perpetrators then fled the scene, with Dunn driving the borrowed getaway car.

This aforementioned plan, with its premeditative aspects, clearly lacks the impulsiveness and non-leadership interactions associated with mentally retarded persons. Merely because defendant's execution of the plan went awry said less about defendant's adaptive skills [20] (including his wayward

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[20] Dr. Pelligrin testified about adaptive functioning in general, in addition to the consideration of defendant's actions during

the commission of this crime, stating the "record speaks for itself":

> Again, we spent a lot of time talking about getting collateral information from sources about his adaptive functioning and we see what the problems there are. I don't know half the time when we're doing this kind of work, am I really testing a person's adaptive functioning or am I testing the person that I'm asking questions, am I testing their memory, you know, if you're asking them to go way back. Or, you know, I think it's several steps removed. I think that the best data in every case but in this case is what the record reflects.
>
> * * *
>
> The record reflects that he is capable of planning, self-initiating, initiating interactions with others, initiating walking in off the street to fill out a job application, initiating going to-taking his income tax and purchasing a car which was what one of his girlfriends said that I saw in the trial transcript, keeping a job, waking himself up in the morning, getting himself dressed, driving to work, keeping a job, giving his girlfriend whatever she wants financially and then that's not even to get-that's leaving aside the elements of the crime that are just replete with time after time of his initiating, being a leader, instructing others, carrying out a sequence of events.
>
> Again, I think the record speaks for itself. I think you have to go so far out of the way to ignore that by saying, as we heard yesterday, that that's an example of peak performance. Well, I guess you could explain any behavior away, but when you look at the totality of the record, I think it speaks for itself.

driving skills) than about the stress accompanying commission of first degree murder during a major bank robbery. Based upon the firmly established facts of this case, it has been demonstrated defendant is capable of initiating, planning, and leading others in the execution of a pre-meditated plan. Furthermore, Dr. Gouvier, the only expert who found defendant mentally retarded, did not consider the defendant's actions during the commission of this crime in his diagnosis of defendant.

After examining all available information, including the experts' conclusions, lay testimony, anecdotal evidence, and school and work records, it is clear defendant has not met his burden to show, by a preponderance of the evidence, that he is mentally retarded. Not only has defendant never had a diagnosis of mental retardation prior to these proceedings, the range of possible I.Q.'s that the more recently reported scores represent fall mostly above 70, indicating the defendant is not mentally retarded. There is a stronger indication of potential mental retardation when examining the adaptive functioning scores reported by Dr. Gouvier, but these scores are contrasted by the scores reported by Dr. Vosburg, the anecdotal evidence presented by the State in the form of school and work records, and consideration of defendant's actions before and during the commission of the instant crime. As such, although defendant's I.Q. scores and display of some adaptive skills (e.g., forklift operations) would not necessarily preclude a finding of mild mental retardation, he bears the burden of demonstrating that more probably than not he is mentally retarded and so exempt from capital punishment. In this

instance, it is clear defendant suffers from low intellectual functioning, but, based upon all the evidence before us, we do not find defendant has met his burden to establish the trial court erred in finding he is not mentally retarded. The trial court's ruling is affirmed, and defendant is therefore not exempt from capital punishment.

Capital Sentence Review

Under *La. C.Cr.P. art. 905.9* and La. S.Ct. R. 28, this court reviews every sentence of death imposed by the courts of this State to determine if it is constitutionally excessive. In making this determination, the court considers whether the jury imposed the sentence under influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. In the instant case, as part of the original appeal, the trial court submitted a Uniform Capital Sentence Report ("UCSR"), and the Department of Public Safety and Corrections ("DOC") submitted a Capital Sentence Investigation ("CSI"). The State also submitted a Capital Sentence Review Memorandum.

Defendant, James M. Dunn, an African-American male, was thirty-two (32) years of age at the time of the commission of the murder of Lisa Ann Dupuis, a 22-year-old white female and Jackie Blanchard, a 31 year-old white female. Defendant grew up in a two-parent household on Little Hope Street in Garyville, Louisiana, located in St. John the Baptist Parish, with one brother and two sisters, and is the third

child of the family. Defendant completed the tenth grade in school and subsequently attended Vo-Tech at Dequincy Correctional Center in Auto Body and Fender repair. According to the UCSR, the defendant's I.Q. is in the medium range of 70-100, although the defense, as discussed above, strenuously argues he falls in the bottom of that range. Defendant had one juvenile offense for the crime of Receiving Stolen Things. He worked for Dugean Perrilloux as an auto and body mechanic from the age of sixteen until he was incarcerated in 1985 for manslaughter. [21] The defendant was released on parole on August 2, 1995, and was to complete parole on January 16, 2006. On April 6, 1999, the Louisiana Board of Parole revoked his parole because of the present offense. During his release he was employed for a total of 18 months by Elmwood Marine, Con Star, and Southern Beverage. Defendant is not married but he does have one child, a daughter, who is presently approximately eleven years old. Defendant's mother, Joanne Dunne, is still living, and his father died in 1988.

Passion, Prejudice, and Other Arbitrary Factors

Given that Assumption Parish is a small community, and many members of the venire would have been familiar with the murders, the jury was selected from Calcasieu Parish. While race may have been a factor in these proceedings as illustrated by the State's reverse *Batson* challenge (i.e., a claim

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[21] As previously mentioned, defendant was originally charged with First Degree Murder but pled guilty to Manslaughter. He was sentenced to 21 years imprisonment at hard labor.

that defendant used one of his peremptory challenges for racially motivated purposes) and the trial court's subsequent ruling on the motion, this issue was thoroughly addressed by this court on original appeal and found to lack merit. *See, Dunn, 01-1635 at 7-13, 831 So. 2d at 869-73.* No other arbitrary factor appears to have been interjected in these instances.

Aggravating Circumstances

At trial, the State argued two aggravating circumstances: 1) the offender was engaged in the perpetration or attempted perpetration of an armed robbery; 2) the offender knowingly created a risk of death or great bodily harm to more than one person. The jury found such a circumstance present on each count. The evidence, particularly the eyewitness testimony of Ms. Simoneaux which placed the armed defendant alone in the bank's side office with the victims when the fatal shots rang out, fully supported the jury's finding.

Proportionality

Although the federal Constitution does not require a proportionality review, *Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L. Ed. 2d 29 (1984),* comparative proportionality [Pg 32] review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell, 561 So. 2d 692, 710 (La. 1990), cert. denied, 498 U.S. 1074, 111 S. Ct. 799, 112 L. Ed. 2d 861 (1991).* This court, however, has vacated only one capital sentence on the ground that it was disproportionate to the offense and the circumstances of the offender, *State*

v. Sonnier, 380 So. 2d 1, 7 (La. 1979), although this court has effectively de-capitalized another death penalty case by reversing it on other grounds. *See State v. Weiland, 505 So. 2d 702 (La. 1987)* (on remand, the State reduced the charge to second degree murder and the jury returned a verdict of manslaughter).

This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier, 380 So. 2d at 7.*

The State's Sentence Review Memorandum reveals since 1976, seventeen cases have originated as first degree murder charges in Assumption Parish, including the defendant's case, and of those, juries have recommended the imposition of the death penalty only twice, in the defendant's case, and the case of his co-defendant, Anthony D. Scott. Given the scarcity of comparable cases in Assumption Parish, it is appropriate for this court to look beyond the judicial district in which the sentence was imposed and conduct the proportionality review on a state-wide basis. *State v. Davis, 92-1623, pp. 34-35 (La. 5/23/94), 637 So. 2d 1012, 1030-1031.* A state-wide review reflects this court has affirmed capital sentences in a variety of cases involving multiple deaths or when a defendant creates the risk of death or great harm to more than one person. *State v. Wessinger, 98-1234 (La. 5/29/99), 736 So. 2d 162* (ex-employee returns to restaurant, shoots three and

kills two); *State v. Robertson, 97-0177 (La. 3/4/98), 712 So. 2d 8* (mixed-race couple stabbed to death in their home during an aggravated burglary); *State v. Baldwin, 96-1660 (La. 12/12/97), 705 So. 2d 1076* (defendant shot and killed his estranged wife and the three men who were with her at the time); *State v. Tart, 93-0772 (La. 2/9/96), 672 So. 2d 116* (defendant murdered his estranged girlfriend and severely wounded her mother); *State v. Taylor, 93-2201 (La. 2/28/96), 669 So. 2d 364* (ex-employee returns to restaurant, kills one employee and attempts to kill another); *State v. Sanders, 93-0001 (La. 11/30/94), 648 So. 2d 1272* (husband kills estranged wife and new boyfriend); *State v. Deboue, 552 So. 2d 355 (La. 1989)* (murder of two children in an apartment defendants intended to burglarize). Because this court has overwhelmingly upheld death sentences in such cases, the death sentence imposed in this case does not appear disproportionate.

DECREE

For the reasons assigned herein, and having already affirmed his conviction, this court finds defendant not mentally retarded and affirms his sentence. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari, or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this

court under *La. C.Cr.P. art. 923* of finality of direct appeal, and before signing the warrant of execution, as provided by *La. R.S. 15:567 (B)*, immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under *La. R.S. 15:149.1*; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

AFFIRMED.

CONCUR BY: KNOLL

CONCUR

KNOLL, J., additionally concurring.

I additionally concur with the majority opinion. The trial court did not err in finding defendant James Dunn failed to meet his burden of proving he is mentally incompetent to receive the death penalty under *Atkins v. Virginia, 536 U.S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002)*. I write separately to address the proper application of the so-called "Flynn effect" in capital cases. Put simply, the question is whether psychologists who administer IQ tests to capital defendants should adjust those scores to reflect the tendency for nationwide IQ scores to increase an average of approximately 0.3 points per year.

The applicability of the Flynn effect in Atkins proceedings is a hotly contested legal issue, and has potentially important ramifications in Louisiana. *La.*

C.Cr.P. art. 905.5.1 defines mental retardation, in part, by "significant limitations in ... intellectual functioning." This has been interpreted as an IQ score of two standard deviations below the mean. *State v. Williams, 2007-1407 (La. 10/20/09), 22 So. 3d 867, 881 n.10, Morris v. Dretke, 413 F.3d 484, 489-90 (5th Cir. 2009).* In close cases, the decision of whether or not to take the Flynn effect into consideration could be the deciding factor in whether a defendant's IQ score qualifies him as mentally retarded.[1]

I. Legal Approaches to the Flynn Effect

Since the U.S. Supreme Court's decision in *Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)*, lower courts have struggled to determine whether the Flynn effect should be applied in determining a defendant's eligibility for the death penalty. However, the issue is *res nova* in Louisiana.

At one end of the spectrum, some courts have accepted the Flynn effect, and even mandated its application. For instance, naval courts are required to adjust IQ scores according to Flynn's formula.

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[1] At the outset I note, even if the Flynn effect is applied to defendant's IQ scores as recommended by the defense expert, defendant's adjusted scores are not so low as to require finding he is mentally retarded under Atkins. Moreover, Louisiana does not determine whether a defendant is mentally retarded by applying a strict numerical cutoff to IQ scores. We also must take into account the defendant's "adaptive behavior as expressed in conceptual, social, and practical adaptive skills." *La. C. Cr. P. 905.5.1.* The Flynn effect has no bearing on defendant's conceptual, social, or practical adaptive skills.

U.S. v. Parker, 65 M.J. 626, 629 (N-M Ct. Crim. App. 2007)("the observed IQ score must be adjusted by the 'Flynn effect.'") The U.S. Fourth Circuit has criticized and reversed a district court's decision for failure to take into account the "relevant evidence" of the Flynn effect. *Walker v. True, 399 F.3d 315, 322-23 (4th Cir. 2005).* Yet the Walker court did not require the district court to accept the Flynn effect as true, but merely ordered it to "consider the persuasiveness of Walker's Flynn Effect evidence" on remand. Id. The Eleventh Circuit has likewise cited with approval an expert psychologist's testimony on the Flynn effect. *Holladay v. Allen, 555 F.3d 1346, 1350 n.4 (11th Cir. 2009); Thomas v. Allen, 614 F. Supp. 2d 1257, 1281 (M.D. Ala. 2009)*("A court must also consider the Flynn effect and the standard error of measurement in determining whether a petitioner's IQ score falls within a range containing scores that are less than 70.")

Other courts have taken a middle ground and left the decision of whether to credit or discredit the Flynn effect to the district court's discretion. See *State v. Burke, 2005 Ohio 7020, 2005 Ohio App. LEXIS 6285 (Ohio Ct. App.2005)*(A "trial court must consider evidence presented on the Flynn effect, but, consistent with its prerogative to determine the persuasiveness of the evidence, the trial court is not bound to, but may, conclude the Flynn effect is a factor in a defendant's IQ score.")

Still other courts, such as the Texas Court of Criminal Appeals, have expressly disapproved of the Flynn effect: "We have previously refrained from applying the Flynn effect, however, noting that it is an 'unexamined scientific concept' that does not

provide a reliable basis for concluding that an appellant has significant sub-average general intellectual functioning." *Neal v. State, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008)*; *In re Mathis, 483 F.3d 395, 398 n.1 (5th Cir. 2007)*("The Flynn Effect . . . has not been accepted in this Circuit as scientifically valid."), *Thomas v. Quarterman, 335 Fed. Appx. 386, 390-91 (5th Cir. 2009)* (A state court decision imposing death penalty was not unreasonable for failure to apply the Flynn effect). The Alabama Court of Criminal Appeals also recently cited In re Mathis and expressed skepticism regarding the Flynn effect's scientific validity. *Beckworth v. State, 2009 Ala. Crim. App. LEXIS 64 at *61 n.5 (Ala. Crim. App. 2009).*

The Kentucky Supreme Court has likewise disapproved of the Flynn effect. *Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005).* As the relevant statute contains a "bright line" IQ cutoff of 70,[2] the court reasoned it was up to the legislature to determine how an IQ score is determined. By passing a statute imposing a bright line rule, with no provision for adjustment by the court, the Kentucky legislature chose not to credit the Flynn effect. *Id. at 375-76.*

II. The Academic Underpinnings of the Flynn Effect

The widely differing approaches taken by the above-cited courts emphasize the difficulties courts

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[2] See *KRS § 532.130(2)*: "'Significantly subaverage general intellectual functioning' is defined as an intelligence quotient (I.Q.) of seventy (70) or below." Notably, Louisiana law does not impose a strict cutoff for IQ scores.

have in determining someone's "true" IQ score. Measuring IQ score is not like measuring height. While height is an objective measurement - someone who is 5'11" will be 5'11" no matter who he stands next to - IQ scores are based on a normal distribution curve, which means an individual's score is only meaningful in relation to the scores of the other people who took the test. See J.C. Oleson, The Insanity of Genius: Criminal Culpability and Right-Tail Psychometrics, *16 Geo. Mason L. Rev. 587, 598 (2009).*

Both the Wechsler Adult Intelligence Scale ("WAIS"), administered to defendant by Dr. Gouvier and Dr. Hale, and the Stanford-Binet test, administered by Dr. Pellegrin, have a mean score of 100. Each time a new version of the WAIS test is developed, "the administration of the test to a large, and ideally heterogenous and representative, sample of individuals is used to develop norms based on age and/or grade level." Lois A. Weithorn, Conceptual Hurdles to the Application of *Atkins v. Virginia*,59 U.C. Hastings L. J. 1203, 1214 (2008). The average score of this sample group is thereafter defined as 100.

The Flynn effect is named after political scientist James R. Flynn, who wrote The Mean IQ of Americans: Massive Gains 1932 to 1978, 95 Psychological Bulletin 29 (1984). Professor Flynn observed, over time, the mean IQ score in America rose at a rate of approximately 3 points per decade, or 0.3 points per year. Although the "why" and "how"

of this phenomenon are hotly debated, [3] Flynn's original observation is widely accepted.

What is not widely accepted is whether the Flynn effect should be applied to individual IQ scores. As noted above, Flynn observed a population wide increase of approximately 0.3 points per year. It does not follow that the IQ score of every single individual member of the population increases by the same amount. Flynn attempts to hand-wave away this very argument:

> I also wish to call attention to another argument put forward by prosecutors, namely, that the Flynn effect is a "group phenomenon" and cannot be applied to individuals. As the reader now knows, this is just a senseless mantra. When the group making the IQ gains is composed of Americans, those gains render test norms obsolete and inflate the IQ of every individual being scored against obsolete norms.

James Flynn, Tethering the Elephant, 12 Psychology, Public Policy, and Law 170, 184 (2006). Even if we admit, for the purposes of argument, the Flynn effect "inflate[s] the IQ of every individual

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[3] Flynn admits "psychologists are still evaluating the significance of the Flynn effect," but in his opinion this uncertainly "does not mean that we should wait for some distant day before applying our knowledge of the rate of IQ gains to adjust the IQ scores of defendants in current cases." James Flynn, Tethering the Elephant, 12 Psychology, Public Policy, and Law 170, 175 (2006).

being scored against obsolete norms," it most certainly does not follow that it inflates every individual's score equally or consistently on a year to year basis. Yet proponents of the Flynn effect would have courts apply a 0.3 points per year across the board.

In *Wiley v. Epps, 668 F. Supp. 2d 848, 894 (N.D. Miss. 2009)*, a federal district court explained: "a controversy about the Flynn effect exists in its application. Professionals in the field do not disagree the phenomenon exists, but rather, there is professional disagreement regarding whether to adjust an individual's score." The Wiley court refused to require an examining psychologist to take the Flynn effect into account, but it also refused to preclude a psychologist from applying it. *Id. at 894 n.26.* See also Dora W. Klein, Categorical Exclusions for Capital Punishment: How Many Wrongs Make a Right?, 72 Brooklin L. Rev. 1211, 1231 n. 89 (2007), citing I. Bruce Frumkin, Challenging Expert Testimony on Intelligence and Mental Retardation, 34 J. of Psychiatry & L. 51, 60 (2006) ("This is not to say that a psychologist should 'adjust' the IQ score to take into consideration the Flynn effect.") Indeed, there is some evidence the application of Flynn's formula to individual scores is limited primarily to defense psychologists in capital cases. See *Ledford v. Head, 2008 U.S. Dist. LEXIS 21635, *19 (N.D. Ga. 2008)*("[E]xperts for both petitioner and respondent agreed that it is not used in clinical practice to reduce IQ scores.... Both Dr. King and Dr. Zimmermann testified that they have never seen it utilized except in capital cases.... The Court is hesitant to apply a theory that is used solely for the

purpose of lowering IQ scores in a death penalty context.")

A second, equally troubling, flaw, comes from the data in Flynn's own article. While the observed gains in IQ scores average approximately 0.3 points per year over the long run, they certainly do not proceed in a linear or predictable fashion. James Flynn, Tethering the Elephant, 12 Psychology, Public Policy, and Law 170, 177 (2006). The actual yearly rate of change ranges from 0.917 points [Pg 7] per year to -0.117 points per year, depending on the time period and the particular version of the test used. Id.

Specifically, the 0.3 point per year increase does not neatly fit with the scores from the Wechsler WAIS-III test, the version administered to the defendant by Dr. Hale and Dr. Pellegrin. James Flynn, Tethering the Elephant, 12 Psychology, Public Policy, and Law 170, 177 (2006). See also *Ledford v. Head, 2008 U.S. Dist. LEXIS 21635 (N.D. Ga. 2008)*("[T]he WAIS-III, in particular, does not appear to be subject to the 0.3 rate of IQ gain.... Flynn's data suggests that the yearly gain on the WAIS-III is closer to 0.17 than to 0.3.")

Instead, the 0.3 points per year adjustment fits more closely with data gathered from the Wechsler Intelligence Scale for Children ("WISC"), which is designed for use from ages 6 to 16 only. James Flynn, Tethering the Elephant, 12 Psychology, Public Policy, and Law 170, 184 (2006). Defendant apparently has no WISC scores, as he did not take any formal IQ tests prior to the age of 16. Flynn admits the data on adult WAIS-III scores is "less than perfect" but argues courts should "not ignore

decent data just because it would be preferable to have perfect data." Id. Although courts cannot demand "perfect data" of anyone, we can and indeed must require a high level of scientific reliability before we accept a theory. In my opinion, the Flynn effect does not reach the requisite level of reliability as applied to the IQ scores of individual adult defendants.

III. Conclusion

I agree with the American Association on Mental Retardation that it is "critically important to use standardized tests with the most updated norms." Mental Retardation: Definition. Classification, and Systems of Supports 56 (10th ed. 2002). Courts conducting Atkins hearings may take into account when a testifying psychologist has used an obsolete or outdated IQ test. However, whether the "Flynn effect" applies to individual IQ scores remains speculative, and it would be inappropriate to apply Dr. Flynn's recommended 0.3 point per year deduction to defendant's IQ scores for the purposes of *La. C.Cr.P. 905.5.1.*

APPENDIX B

STATE OF LOUISIANA
versus JAMES DUNN

No. 2001-KA-1635

SUPREME COURT OF LOUISIANA

2001-1635 (La. 11/01/02);
831 So. 2d 862; 2002 La. LEXIS 3065

November 1, 2002, Decided

SUBSEQUENT HISTORY: Subsequent appeal at, *Remanded by State v. Dunn, 847 So. 2d 1183, 2003 La. LEXIS 1342 (La., May 9, 2003)*
Related proceeding at *State v. Scott, 2006 La. LEXIS 148 (La., Jan. 19, 2006)*

PRIOR HISTORY: ON DIRECT APPEAL TO THE LOUISIANA SUPREME COURT, TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ASSUMPTION, HONORABLE ALVIN TURNER, JR., JUDGE.

DISPOSITION: Affirmed and remanded.

COUNSEL: Frederick Kroenke, Jr. Esq., Denise LeBoeuf, Esq., Counsel for Applicant.

Hon. Richard P. leyoub, Attorney General, Hon. Robert Rick Bryant, District Attorney, Donald D. Candell, Esq., Robert C. O'Bannon, Esq., Hon. Anthony G. Falterman, Esq., Counsel for Respondent.

Mark D. Macnamara, Esq., Counsel for American Association of Mental Retardation, (Amicus Curiae).

JUDGES: Chet D. Traylor, J., Bernette J. Johnson, J., Pascal F. Calogero, Jr., J., Jeannette Theriot Knoll, J., Catherine D. Kimball, J., John L. WEIMER, Justice. Jeffrey P. VICTORY, J., concurring in part and dissenting in part.

OPINION BY: WEIMER

OPINION

[*864] WEIMER, Justice

This matter involves a direct appeal to this court from a conviction of two counts of first-degree murder and a sentence of death for each count. *LSA-Const. art. V, 5(D).*

On March 18, 1999, after three days of voir dire and a four-day trial, a Calcasieu Parish [1] jury found the defendant guilty of **[*865]** the first degree murders of Jacqueline Guillot Blanchard and Lisa Ann Dupuis. During the penalty phase of the trial,

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[1] Although the crime took place in Assumption Parish, the trial court granted the defendant's motion for a change of venue as to selection of the jury only. Thus, the jury was selected in Calcasieu Parish, but the trial was conducted in Assumption Parish.

the jury found two aggravating circumstances: 1) the offender was engaged in the perpetration or attempted perpetration of an armed robbery; and, 2) the offender knowingly created a risk of death or great bodily harm to more than one person. The defendant was sentenced to death on each count.

Defendant now perfects this appeal based on six assignments of error. For reasons that follow, we affirm defendant's conviction and remand the matter for a hearing to determine whether defendant is mentally retarded[2] such that he is exempt [Pg 2] from the death penalty as mandated by the decision rendered by the United States Supreme Court in ***Atkins v. Virginia***, *536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).*

FACTS

On June 4, 1998, the defendant borrowed a rental car from his girlfriend Leola Steward and picked up Kendall Breaux and Anthony Scott in Garyville, Louisiana. The three then went to Napoleonville. The defendant drove past the Iberville Bank to a convenience store where the trio purchased soft drinks. They then returned to the bank shortly before noon. Defendant parked the car in a

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[2] See **State v. Williams**, 01-1650 n.2 (La. 11/01/02), *831 So.2d 835*, regarding the use of the term "mental retardation" and the AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002) text at page xii which notes although there is dissatisfaction with the term, no satisfactory substitute has been developed.

handicapped parking space, and he and Scott entered the bank. There were two employees in the bank at the time. Lisa Dupuis, age 22, was behind the teller counter and 31-year-old Jacqueline Blanchard was seated at a desk near the front door. The bank surveillance camera documented the defendant and Scott entering the bank at approximately 11:40 a.m. The tape shows Ms. Dupuis conducting a written transaction for the defendant. While she filled out the document, defendant left the bank and walked back to the car where Breaux was waiting. Defendant handed Breaux a pager and instructed him to enter the bank in 30 seconds. Defendant then walked back into the bank and aimed a 9mm handgun at Ms. Dupuis.

There were no other eyewitnesses in the bank at the time, but the bank's surveillance camera captured the initial stages of the robbery as it unfolded. As soon as he re-entered the bank, the defendant pulled out a 9mm handgun and aimed it at Ms. Dupuis. At the same time, Scott pulled out a large revolver and aimed it at Ms. Blanchard. While Scott forced Ms. Blanchard to stand, defendant vaulted over the customer counter and grabbed Ms. Dupuis from behind. Scott forced Ms. Blanchard to walk to the teller area where Dunn was holding Ms. Dupuis at gunpoint. The two men began removing money from the cash drawers while still pointing their weapons at the women. Scott and the defendant then forced both women into a side office. Although there were no video cameras in the office, the lobby camera photographed some of this activity. Breaux then entered the bank carrying a Prestone Anti-Freeze container filled with gasoline and began

to douse the bank lobby with it. Ms. [Pg 3] Blanchard appeared to be praying, while Ms. Dupuis stood behind her. At that point, the video equipment **[*866]** was pulled from the wall, interrupting the recording.

A bank customer, Earline Simoneaux, arrived at the drive-up teller window at the same time and noticed that the blinds were drawn, but the slats were open. She peered through the slats and saw two black males running out of the side office. Ms. Simoneaux testified that just as she started to ring the teller call button and just after the two black males bolted through the front door of the bank, she heard a gunshot, and then moments later, two more gunshots. She then saw a black male wearing a white cap run out of the office. He glanced back at her as he ran. Ms. Simoneaux then drove to the side of the bank where she saw a green Pontiac Sunfire drive out of the parking lot. She attempted to follow the car, but once the police arrived, she returned to report what she had seen. Ms. Simoneaux was certain that the defendant, who was wearing a white hat, had been the perpetrator. He was the one who had fired the shots after the other two black males had left the bank.

Assumption Parish Sheriff's Deputy Michael Brown responded to the bank alarm. As he drove towards the bank he saw a green Pontiac exit the parking lot. Expecting a false alarm, he approached the front door, opened it, and noticed a strong odor of gasoline. He did not see the tellers so he announced his presence. He got no response, but heard a gurgling sound coming from the side office. As he approached he saw Jacqueline Guillot Blanchard

lying face down in a pool of blood gasping for breath. He saw Lisa Dupuis' legs, and looked behind the teller counter and saw her lying in a pool of blood as well. He ran back outside to call for additional officers and an ambulance. He re-entered the bank and noticed Ms. Blanchard attempting to breathe. He checked Ms. Dupuis for a pulse and determined that she was dead.

Ms. Blanchard was moved to the lobby when the ambulance arrived. She died on the way to the hospital. Further investigation revealed that both women were shot multiple times in the head and upper body. Bullets and empty casings that matched the defendant's 9mm weapon were found under and around the victims' bodies. Police found gasoline on Ms. Blanchard's desk, the teller counter, and in areas inside the office. The video equipment along with a total of $ 16,615.00 in cash was missing from the bank.

Ms. Simoneaux returned to the bank and gave police a description of the car and the defendants. At that point police put up roadblocks throughout the parish. Two deputies attempted to stop a vehicle fitting the description at a roadblock in Ascension Parish. The defendants drove through the roadblock at high speed. As they rounded a curve, the vehicle, driven by the defendant, drove directly into a train which was passing on nearby railroad tracks perpendicular to the highway. Uninjured, the defendant and Scott jumped out of the front of the car and fled. A foot chase ensued.

Kendall Breaux exited the back seat of the car and attempted to run away but was captured by police at the scene of the crash. Defendant and Scott were captured in a sugar cane field about two miles away. All of the money, the video equipment and both weapons were found. Some items were found in the vehicle while other items were found in the cane field where Scott and defendant were hiding.

PRE-TRIAL ISSUES

ARGUMENT NO. 1

(Assignment of Error No. 2)

In his second assignment of error, the defendant claims that the trial court erroneously **[*867]** abridged his right to present a defense. Specifically, defendant argues that the court erred by granting the state's motion *in limine* to exclude the introduction of actions and statements of the co-defendants before and after the murder to demonstrate that the defendant was a follower and not a leader. Defendant argues that the statements made by Breaux are not hearsay under *LSA-C.E. art. 801(D)(3)(b)* because they were made in furtherance of a conspiracy and during the continuation of the conspiracy.

Although appellate counsel argues that evidence of statements made by Breaux and Scott was admissible under the co-conspirator hearsay exception in *LSA-C.E. art. 801(D)(3)(b)*, the trial transcript shows that defense counsel sought only to establish from police witnesses that the co-defendants had given statements completely at odds with what the bank surveillance tape depicted of

their actions at the time of the robbery. Counsel did not seek to introduce any details of those statements and informed the court that he would call other witnesses to establish that Breaux had [Pg 5] been the instigator of the plan to rob the Iberville Bank.[3] The trial court agreed with the State that the co-defendants were not on trial and that if neither Breaux nor Scott appeared to testify, the court would "not allow the defense to make any reference to any statements that they may have made."

In the context in which it was made, the trial court's ruling does not reflect an abuse of its broad discretion in determining the relevancy of evidence. Whether the co-defendants gave post-arrest

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[3] Although trial counsel did not specifically refer to this portion of the Code of Evidence when making his argument to the trial court, he stated that:

> We were going to ask for this Motion in Limine also -- to see where the line will be drawn as to whether or not Kendall Breaux's statements to police were consistent with what was on the tape. That's all . . . And that was the extent of our mentioning of Kendall Breaux or Anthony Scott, because both of them, as you recall -- well you don't recall because you didn't see any of the evidence -- Kendall Breaux made statements that totally fly in the face of what we see on TV. And I'm not going to ask specifics of anyone of what he said, but I will ask whether or not the actions that we see him perform on the tape, on the bank video camera -- are consistent with what he told them . . . .Once again, my question would be limited to, were his statements consistent with what is shown on the video tape. As far as Kendall Breaux's coming and seeking out James Dunn, I will introduce that through testimony from credible witnesses.

statements in which they attempted to minimize their own roles in the robbery had no bearing on the defendant's culpability for his own acts inside the bank. Moreover, to the extent that the co-defendants attempted to shift blame to the defendant, their post-arrest statements were presumptively unreliable. ***Lee v. Illinois**, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).* Any opinion as to whether the statements matched what was depicted on the bank surveillance tape, in support of a defense at the guilt stage that the defendant was merely a follower and not the leader in the conspiracy, was irrelevant because the defense had no validity under Louisiana law. Even outright compulsion of another under the threat of death does not justify or excuse commission of a homicide. *LSA-R.S. 14:18(6).* The proposed testimony thus risked diverting the jury's attention and confusing the issues at the guilt stage and was properly excluded by the court. "A trial judge's determination regarding the relevancy of offered testimony is entitled to great weight and should not be overturned absent a clear abuse of **[*868]** discretion." ***State v. Stramiello**, 392 So. 2d 425, 428 (La. 1980).*

Appellate counsel complains that the State "sucker punched" the defense by allowing it to inform jurors during its opening remarks that it would show Breaux was the mastermind behind the bank robbery and then made its motion *in limine* to cut the heart out of that defense. The loss to the defense during the guilt stage was minimal. During the trial, jurors viewed the bank surveillance tape and could see for themselves defendant pulling out

his 9mm and vaulting over the counter to confront Ms. Dupuis. Jurors also had to judge for themselves the credibility of Ms. Simoneaux's testimony that the other two perpetrators had just reached the outside of the bank when the shots rang out from the inside office. Defendant, wearing a white cap, then exited the bank. The distinguishing element between first and second degree felony murder turned on whether jurors believed Ms. Simoneaux's identification of the defendant as the white-capped shooter, not on the question of who instigated and led the bank robbery.

The relative culpability of the three men was relevant during the penalty phase when jurors were charged by law to consider whether the defendant committed the offense while "under the influence or under the domination of another person." *LSA-C.Cr.P. art. 905.5(c).* Appellate counsel again fails to show how Breaux's attempts to minimize his own role in the offense to the police after his arrest had any probative value on the question of whether he masterminded the crime and took advantage of the defendant's alleged limited mental capacity to ensnare him in the offense. Appellate counsel fails to show how the statements would have advanced the penalty phase defense that the defendant was a mere follower, not a leader, in the offense.

Appellate counsel can show no prejudice from the trial court's ruling regarding Breaux's pre-arrest statements. At the close of the defense case during the guilt phase, counsel called Olivia Mazique, the defendant's girlfriend and mother of his child, to testify. Counsel sought to establish the nature of the relationship between the defendant and Breaux; however, a controversy ensued over whether Ms.

Mazique had violated the court's sequestration order disqualifying her from testifying. In a proffer outside the jury's presence, Ms. Mazique testified that in the weeks before the robbery, while she and the defendant were sleeping, Breaux would tap on the bedroom window, summoning the defendant outside. The defendant would leave, speak with Breaux outside for "no more than a minute," and then return to bed. She stated that she never heard any of the conversations between the defendant and Breaux.

Given Ms. Mazique's testimony that she never overheard any of the conversations between the two men, the trial court's exclusion of any testimony as to those conversations clearly did no harm to the defense at either stage of the trial. The record clearly shows that the court saw no relevance to the testimony and excluded it on those grounds. The trial court correctly ruled that the witness simply was not in a position to testify as to who was the leader and who was the follower in those conversations.

Ms. Mazique appeared as a defense witness during the penalty phase and made a plea for the defendant's life, describing him as a compassionate, caring, and loving man, a portrait she conceded was wholly at odds with what the jury knew of him from the bank robbery. Although unsuccessful in sparing the defendant's **[*869]** life, her testimony far outweighed the loss of any testimony with regard to whether defendant was the leader based on those fleeting, early morning conversations she did not hear.

Under the circumstances of this case, we find no abuse in the trial court's determination to exclude introduction of actions and statements of the co-defendants who did not testify at defendant's trial.[4]

This assignment lacks merit.

VOIR DIRE ISSUES

ARGUMENT NO. 2

(Assignment of Error No. 1)

In his first assignment of error, the defendant claims that the trial court erred by denying his peremptory challenge of venire member Anderson on the basis that it was improperly motivated by discriminatory intent.

In ***Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)***, the Supreme Court held that an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. See also, *LSA-C.Cr.P. art. 795*. If the challenger makes a prima facie showing of discriminatory strikes, the burden shifts to the opposing party to offer racially-neutral explanations for the challenged members. The neutral explanation must be one which is clear, reasonably specific, legitimate, and related to the particular case at bar. ***State v. Collier, 553 So. 2d 815, 820 (La. 1989)***. If the race-neutral explanation is tendered, the trial court must decide, in step three of the **Batson** analysis, whether the challenger has

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[4] We make no ruling whether this alleged evidence may have other independent relevance, if properly introduced, at the hearing ordered in this matter regarding retardation.

proven purposeful discrimination. ***Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).*** A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. ***Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395 (1991)***; ***Batson, 476 U.S. at 98, n. 21, 106 S. Ct. at 1724.***

The equal protection rights of prospective jurors were given an added measure of protection in ***Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)***, which held that a criminal defendant may not use peremptory challenges in a racially discriminatory manner to exclude jurors from his jury. **McCollum** involved white defendant's striking black venire persons. In ***State v. Knox, 609 So. 2d 803 (La. 1992)***, this court interpreted **McCollum** to apply to black criminal defendants and held that **McCollum** prohibits them from exercising their peremptory challenges to exclude white jurors from the jury. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. ***Purkett v. Elem, 514 U.S. at 768, 115 S. Ct. at 1771.***

The State initiated its first reverse-**Batson** objection after the defense peremptorily challenged venire member Messenger. The State's reasoning was that counsel had, at that point in time, challenged eight potential jurors, all of whom had been white. The court heard argument from the State and defense as to seven of the challenged jurors and determined that the defense had provided race-neutral reasons for the peremptory challenges

of venire members Hudson, Clark, Leleux, Williams, Perrin, Alexander, and Messenger. Counsel for defendant were unable to provide reasons for the first two challenges to **[*870]** venire members Wright and Whitley at that time because their notes as to the first panel were not in the court room. Challenges for Wright and Whitley were to be reviewed the following day.

The jury selection process continued and several prospective jurors were considered--one was accepted while others were excused. The next prospective juror to be considered was Anderson. The State accepted him; however, the defense exercised a peremptory challenge excusing Mr. Anderson. The following exchange occurred:

> STATE: Again, we request that it's a continuing **Batson** challenge at this point.
>
> DEFENSE: I would be glad. Let's clear them while we're here.
>
> COURT: Okay.
>
> DEFENSE: Mr. Anderson not only said that he favors the death penalty, but in fact he favors the death penalty in most circumstances. I feel that he's more than ready to vote for death. I had a few challenges left, I chose not to have him on my jury.
>
> STATE: Your Honor, this guy is Catholic, and his religion -- his religious organization believes that the death

penalty is wrong. He said that he can vote for death, but he wouldn't automatically do so, that he would consider mitigating circumstances, and it just depends on the situation. I don't think Mr. Anderson said or did anything that would indicate that he would be anything but a fair and impartial juror, and I believe he's excluded based on race.

DEFENSE: Can I make one more comment? Mr. Nolting has some notes I didn't have. Mr. Nolting's notes also reflect that he -- and I forgot, I didn't write this down, I had very limited space -- but that the situations that it was not warranted in -- the death penalty was not warranted -- would be in the mercy killing. That he could give the death penalty in a situation where there was a violent death.

NOLTING: (Defense Counsel) He said in this situation.

DEFENSE: In this situation. That he has no problem giving the death penalty let's say in this situation.

NOLTING: In this case.

* * * *

COURT: Well, that's not the criteria. I remember this particular juror's response, as I went through that clearly with him. I don't see anywhere in there

> where this individual would refuse to look at all the circumstances and consider any lesser included offense so far as this particular charge is concerned. I don't see anything in his responses, in totality, so far as the penalty phase is concerned, that he would not consider all mitigating circumstances and aggravating circumstances. Your argument so far as a race neutral reason under Batson, when considering the argument of the State, your argument and the responses of Mr. Anderson, I do not find that you stated a race neutral reason for Mr. Anderson. Therefore, Mr. Anderson will be Juror No. 6.

[*871] *Article I, Section 17 of the Louisiana Constitution* grants an accused the right to a full and complete voir dire examination and to the exercise of peremptory challenges. The exercise of peremptory challenges must be race neutral and is governed by the rulings of the court in **Batson** and its progeny.

In ***State v. Tyler, 97-0338 (La. 9/9/98),723 So. 2d 939***, this court held that the evidence supported the judge's finding that racial discrimination motivated defendant's peremptory challenges of two jurors and that the race-neutral explanation of jurors' leanings toward the death penalty was a pretext for discrimination in a first-degree murder prosecution. Specifically, the court found that the voir dire responses of jurors showed that their

attitudes toward capital punishment fell far short of justifying a cause challenge and the race-neutral reason offered for excluding them could be viewed as a pretext for discrimination. The jurors had expressed willingness to consider a life sentence depending on evidence and mitigating circumstances. Thus, the court found that purposeful discrimination motivated the peremptory challenges.

During voir dire examination of the panel, the following colloquy occurred between the court and prospective juror Anderson:

> COURT: In regards to the death penalty, you said you're in favor of the death penalty?
>
> ANDERSON: In most circumstances, yes.
>
> COURT: Do you have any general opposition to the death penalty?
>
> ANDERSON: Yes.
>
> COURT: You have opposition to the imposition?
>
> ANDERSON: I don't think I could do that in something like a violent -- like a mercy killing or you know, something like that, I don't think that would be warranted.
>
> COURT: Well, what I'm asking you is this. If you were selected as a juror in this case, would your makeup, knowing

you, do you feel that you would be against the death penalty?

ANDERSON: Not in this situation.

COURT: I'm sorry?

ANDERSON: In this situation, I don't think I would be against it.

COURT: Now, you said not in this situation?

ANDERSON: In this situation, I could go by - I could see the death penalty.

COURT: Now, I'm going to walk this line real carefully. Have you heard anything about this case, other than what's been mentioned in this courtroom? Don't tell me if you have heard anything.

ANDERSON: No, I haven't heard anything other than what's been in here.

* * * *

[*872] ANDERSON: But, like they said, there were some graphic pictures and it sounded violent to me.

COURT: Okay. Have you formed an opinion already on this case?

ANDERSON: No.

COURT: Okay. Would you keep an open mind prior to making any decision?

ANDERSON: Yes.

COURT: So, would you automatically vote to impose the death penalty?

ANDERSON: No, sir.

COURT: Would you consider all of the mitigating circumstances and the aggravating circumstances during the penalty phase, prior to making a decision as to death by lethal injection or life imprisonment without benefit of probation, parole or suspension of sentence?

ANDERSON: Yes.

COURT: Would you give more weight to an aggravating circumstance than a mitigating circumstance?

ANDERSON: No.

Defense claims the race-neutral reason for striking the juror was that he was leaning toward the death penalty. The court did not agree that counsel's explanation was supported by the record. In this case, the court found Mr. Anderson's responses indicated that he could be a fair and impartial juror. Given the responses of Anderson to the questions of counsel and the court and considering the great deference afforded [Pg 12] the trial court relative to the evaluation of discriminatory intent, we are convinced the trial court did not err in determining that counsel for defendant engaged in discrimination by exercising a peremptory challenge against Anderson. Thus, the trial court acted properly in remedying this

discrimination by ordering that Anderson be made a member of the jury. See **Batson** and progeny.

This court will very carefully evaluate the trial court's abrogating a defendant's use of a peremptory challenge especially in a death penalty case, where the stakes are so significant. However, the law is quite clear that discriminatory use of peremptory challenges, whether by the defendant or the State, cannot be tolerated.

Review of the record established the trial court paid close attention to the responses of each potential juror and carefully and judiciously evaluated each of the **Batson** challenges lodged by the State and the responses of the defense. The court consciously considered each race-neutral reason given by the defense for exercising peremptory challenges. Because it is difficult to detect intent from a cold transcription of the record, the reviewing court should give great deference to the trial judge's findings since those findings largely turn on an evaluation of credibility. A review of the entire record clearly and unmistakenly demonstrates the trial court did not err.

During oral argument before this court, counsel for defendant claims the **[*873]** trial court never expressly made a ruling on the issue of the State's *prima facie* case of discrimination. Review of the record indicates defense counsel did not make an objection that the State failed to provide *prima facie* proof of discrimination but simply provided an explanation for his challenge of the prospective juror.

In ***State v. Green**, 94-0887, p. 25 (La. 5/22/95), 655 So. 2d 272, 288*, this court held that a trial judge's demand that the challenged party justify the use of a peremptory strike is tantamount to a finding that the challenger has produced enough evidence to support an inference of discriminatory purpose. This court cited ***Hernandez v. New York**, 500 U.S. at 359, 111 S. Ct. at 1866*, approvingly noting that once the trial court rules on the ultimate issue of intentional discrimination, the preliminary issue of whether a *prima facie* showing has been made is moot.

After giving this matter careful and appropriate consideration, we are convinced the decision of the trial court is not clearly erroneous. This assignment of error lacks merit.

ARGUMENT NO. 3

(Assignment of Error No. 4)

In his fourth assignment of error, the defendant claims that venire member Wright should have been removed for cause because of his overall bias. Specifically, defendant argues that Mr. Wright stated on a number of occasions that he could not consider many of the mitigating circumstances which the trial judge had instructed must be considered in the penalty phase. According to the defendant, under close examination he clearly stated that most mitigation was just an excuse. In denying defense counsel's challenge for cause, the trial court stated that though there may have been initial confusion as to mitigation, Mr. Wright had stated that he could follow the law.

Although Mr. Wright expressed a general pro-death penalty stance when initially questioned by the trial court during initial voir dire of the panel, he did not refuse to consider mitigating factors even though he viewed some mitigating factors as excuses. Review of the voir dire of the entire panel indicates a general confusion regarding the bifurcated nature of the trial for the guilt phase and the penalty phase. The court explained the procedure as follows:

> COURT: This trial involves a bifurcated -- it's a bifurcated trial. There's what they call the guilt phase. I'll instruct you on the law as to the guilt phase and that's going to be determining whether you find the individual guilty or not of the crime charged, or a lesser or responsive verdict, which I'll instruct you on the law so far as what those verdicts are. But I'll instruct you on the law that you are to apply to the facts, so far as guilt or innocence is concerned. And then I'll instruct you if you find the defendant guilty of first degree murder -- only if you find him guilty of first degree murder -- then I'll instruct you on the penalty phase. And that's when you get into whether or not the defendant is to be sentenced to death by lethal injection or life imprisonment.

So in both cases, will you follow the law as I instruct you on the law?

WRIGHT: Well, I'd certainly try and I'm saying that with a -- you know, it would be how I would feel morally with what you've given me to work with.

COURT: Okay.

[*874] At one point when being questioned by the defense as to whether he would more than likely vote for the death penalty, Mr. Wright replied: "Well, I can't say that until I've heard everything. This is all supposition on our part you know, I can suppose a lot of things until I'm faced with it."

Following questioning by defense counsel, there was an exchange between defense counsel and Mr. Wright regarding whether an automatic death penalty was in effect for killing a policeman or fireman. An additional question involved whether there was a federal law regarding the death penalty for killing a narcotics agent.

This exchange prompted a bench conference during which the State and defense counsel agreed the entire panel was confused regarding mitigating circumstances and requested assistance from the court in explaining the matter. The court explained as follows:

COURT: Let's see if we can straighten up some confusion. There was a bench conference here and we'll attempt -- we had a little law school session here. Mitigating circumstances that Mr. Nolting mentioned to you, those are circumstances that are

only considered during the penalty phase. The reason being, during the penalty phase the State has to show aggravating circumstances or an aggravating circumstance in order to get the death penalty. That's during the penalty phase. The State has to show an aggravating circumstance in order to obtain or for you to determine whether or not the death penalty should be imposed. Now the defense brings up the mitigating circumstances, because if the State crosses that hurdle of proving an aggravating circumstances or aggravating circumstance to give you sufficient information or evidence as to the death penalty, then the defense wants to show mitigating circumstances to carry you to a lower level or level below that, that being life imprisonment, without benefit of probation, parole or suspension of sentence. So that's why mitigating circumstances come in. The State has to show that there was an aggravating circumstance in the commission of the crime. If they show that, then you're looking at death by lethal injection. Defense counsel, at that point, wishes to show the mitigating circumstances that they want you to consider in taking this from a death by lethal injection to life imprisonment. So the mitigating circumstances don't come into play during the guilt phase. The youth of the offender, whether he was under someone else's domination or control, that does not come into play until the penalty phase. Does that clear things up?

At this point following an interchange with another juror, the court again explained the procedure to be followed in a bifurcated trial. Defense followed with an explanation of mitigating factors concluding with the following.

DEFENSE: . . . Mitigating circumstances are, like he said, they are not excuses to be used to justify an homicide. But the law requires you and it says you shall consider them in determining what the penalty is. Now does everyone understand that now [AS TO ALL JURORS]?

[GENERAL AFFIRMATIVE RESPONSE]

Finally, when the defense challenged prospective juror Wright for cause, the following exchange occurred:

[*875] DEFENSE: Your Honor, we would challenge Mr. Wright for cause as well. I think his attitude toward mitigation is that mitigation was a fancy word for excuse; that if committed on first, that I'm for it, as far as the death penalty, and that basically he would give lip service to mitigation, but if they were found guilty of first degree murder, that he would not consider any other alternative except death.

COURT: Response?

STATE: I must have been in a different room, because I believe when Mr. Nolting was talking to him and the jury

> was obviously confused and you cleared up their confusion, this prospective juror said that he could consider every mitigating circumstance and that he would follow your instruction. And the law requires that they consider it, and the law requires that they follow your instruction.
>
> COURT: The Court acknowledges that there was some initial confusion as to the mitigating circumstances, but after clearing that up, this particular juror did state that he would be able to follow the law so far as the mitigating circumstances are concerned, and the challenge for cause is denied.

The defense exercised a peremptory challenge excusing Mr. Wright.

Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant has exhausted his peremptory challenges. An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. ***State v. Cross, 93-1189, p. 6 (La. 6/30/95), 658 So. 2d 683, 686***; ***State v. Bourque, 622 So. 2d 198, 225 (La. 1993).*** A trial court is vested with broad discretion in ruling on challenges for cause, and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. **State v. Cross**, 93-1189, p. 7, *658 So. 2d at 686*; **State v. Robertson**, [Pg 16] *92-2660 (La. 1/24/94), 630 So.*

2d 1278, 1280. A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and evidence. ***Id., at 1281.***

In the present case, defendant exhausted his peremptory challenges and thus the only issue before the court is whether the trial judge erred when it denied his challenge for cause. The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ***Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985)***; ***State v. Sullivan, 596 So. 2d 177 (La. 1992)***, rev'd. on other grounds *sub nom*; ***Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).*** The basis of the exclusion under *LSA-C.Cr.P. art. 798 (2)(a)(b)*, which incorporates the standard of ***Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968)***, as clarified by **Witt**, is that the juror "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" In a "reverse-**Witherspoon**" context, the basis of the exclusion is that the juror "will not consider a life sentence and . . . will automatically **[*876]** vote for the death penalty under the factual circumstances of the case

before him . . . ." **State v. Robertson**, 630 So. 2d at 1284[5] . If a prospective juror's inclination toward the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted. ***State v. Ross, 623 So. 2d 643, 644 (La. 1993).***

Most recently, in ***State v. Chester, 97-2790 (La. 12/1/98), 724 So. 2d 1276***, this court rejected the capital defendant's claim that the trial court erred when it denied his challenge for cause based on a prospective juror's inability to return a life sentence in case of intentional murder. In **Chester**, the court summarized the juror's responses during voir dire as follows:

> Ms. Galloway responded to the state's questioning that she would listen to both the aggravating and mitigating circumstances and in an appropriate

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[5] The "substantial impairment" standard also applies to the reverse-**Witherspoon** challenges. In ***Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992)***, the Supreme Court held that venire members who would automatically vote for the death penalty must be excluded for cause. The Court reasoned that any prospective juror automatically voting for death would fail to consider the evidence of the aggravating and mitigating circumstances, thus violating the impartiality requirement of the Due Process Clause. *112 S. Ct. at 2229*. The **Morgan** Court adopted the **Witt** standard for determining if a pro-death juror should be excused for cause. In other words, if the juror's views on the death penalty are such that they would "prevent or substantially impair the performance of their duties in accordance with their instructions of their oaths," whether those views are for or against the death penalty, he or she would be excused for cause.

> case return a life sentence. Later, when questioned by defense counsel, she replied that there was a contradiction between specific intent and mitigating circumstances. When defense counsel attempted to explain mitigating circumstances, she replied that she understood them; however, her responses indicated that she was confused about the application of mitigating circumstances in a specific intent crime because she thought mitigating circumstances could apply only when the crime was accidental. However, she also stated in her colloquy that she would listen to both mitigating and aggravating circumstances, and "make a judgment based on what is presented."

State v. Chester, 97-2790, pp. 14-15, *724 So. 2d at 1285-86*. The court concluded that based on her entire colloquy, it did not find the juror expressed "an unconditional willingness to impose a death penalty under any and all circumstances." ***Id.*** Accordingly, the court determined that the trial court did not abuse its discretion when it denied the cause challenge. ***Id.***

The voir dire in **Chester** resembled that conducted in the instant case. Mr. Wright initially expressed the view that mitigating circumstances were merely excuses. He indicated he would consider them, but did not think it would change his mind. Following explanation by the court of mitigating

circumstances and questions regarding whether he would consider the evidence presented and follow the law, Mr. Wright indicated he would.

Considering the broad discretion allowed the court as well as the juror's indication that he could follow the law, we conclude that under the rationale of **Chester**, Mr. Wright did not demonstrate "an unconditional willingness to impose a death penalty under any and all circumstances." **State v. Chester**, 97-2790, p. 15, *724 So. 2d at 1285-86.*

We find no error in the court's ruling. This assignment lacks merit.

[*877] ARGUMENT NO. 4

(Assignment of Error No. 5)

In his fifth assignment of error, the defendant claims that venire member Allain should not have been struck for cause because of her views on the death penalty. Specifically, defendant claims that Ms. Allain was clear in stating that she could impose a sentence of death. However, the record reveals that Ms. Allain was unequivocally opposed to the death penalty.

> COURT: Okay. Now, you stated in regards to the death penalty that you do not believe in it, that you believe in life imprisonment; is that a correct statement that you made?
>
> ALLAIN: Yes, sir, it is.
>
> COURT: Okay. Now, also you made a statement to the effect that you don't

know how you would feel if it was a close family member. Well, what do you mean by that?

ALLAIN: I just mean that if it's something that happened to my family, I think my feelings would change in that order. But as far as my religion and as far as my beliefs, I feel like we're not the -- we don't make that decision, that somebody else does.

Next, under questioning from the State, Ms. Allain again expressed her opposition to the death penalty:

STATE: I'm not going to try to pick on you. And you know what, these are our opinions, these are not right or wrong opinions. And it's perfectly acceptable to have feelings about this. Would you explain a little bit more how you feel about the death penalty?

ALLAIN: I just really feel that it's not our decision, even though the Bible says an eye for an eye, a tooth for a tooth. I just feel that we are forgetting God and we're put on this Earth -- I mean, I don't disagree with punishment, you know, and if someone come to me and killed my mother, I may would feel totally different, you know.

STATE: How do you reconcile with yourself?

ALLAIN: I don't know. I don't know.

STATE: It's weird, right?

ALLAIN: It's weird. It's weird. I mean I've never had anything happen to me or my family, you know, to have to make any type of decision to what -- to well -- the was I really would feel, but I just feel that that's just not an option. To me, I think people should have life imprisonment, a chance to live. I don't agree with us making the decision, you have to die. I don't --

[Pg 19] STATE: No matter what, the defendant lives?

ALLAIN: Right.

STATE: Okay. Would you automatically vote against imposition of the death penalty based on those beliefs?

[*878] ALLAIN: I don't know, it depends on the facts.

STATE: Okay, well the facts are your mother's not the victim here, right?

ALLAIN: Right.

STATE: And no one in your family is a victim here?

ALLAIN: I would have to say that I would vote against the death penalty.

STATE: Could you ever conceive of any circumstance where you, besides an immediate family member, could you?

ALLAIN: I don't know.

* * * *

STATE: Have you always believed against the death penalty?

ALLAIN: [6]Did you ever recently hear of a case in which the death penalty was imposed and you said I agree with that sentence?

ALLAIN: No.

* * * *

STATE: Okay. Is this based on a religious belief from your church or is this a personal belief?

ALLAIN: To an extent, to an extent, but it's more personal.

STATE: And how do you think you came to that?

ALLAIN: Just all my life, that's just the way I felt. I mean, we have a very close family and we're just -- I just was really raised that way. I mean, my mother was -- it was a belief she taught me.

STATE: So you believe this -- it's an ingrained traditional belief of your family and so you don't believe you could go against that belief under any circumstances, other than an immediate

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[6] Although the statement in the record is attributed to Ms. Allain, it is obvious from reading the transcript that the State asked a second question prior to an answer by the prospective juror.

family member, of which you may reconsider your position?

ALLAIN: Right.

STATE: So if you're sitting in a room with these good people and they all want to impose the death --

ALLAIN: That's all I'm saying right. I don't.

STATE: You would still hold to that belief?

ALLAIN: I think so.

[*879] However, despite appellate counsel's argument to the contrary, even the defense's voir dire revealed Ms. Allain believed that the death penalty should not be imposed:

DEFENSE: You had indicated that under all circumstances, you couldn't vote for death; is that correct?

ALLAIN: Right.

DEFENSE: Unless it was someone close in you family?

ALLAIN: No, I said I've never been put in that position, and I could possibly vote for death. I'm against the death penalty and I would definitely consider all mitigation, as I feel that that's only fair.

DEFENSE: Okay.

ALLAIN: I feel like everyone should consider that. It all has a play in the verdict.

DEFENSE: Okay.

ALLAIN: It does not have a play in whether you're guilty or not, I agree.

DEFENSE: Right.

ALLAIN: But it has a play in whether the person deserves life in prison or the death penalty.

DEFENSE: All right. So you can honestly consider the aggravating circumstances, and under certain conditions, impose the death penalty. Is that not correct?

ALLAIN: Yes sir.

A defendant is guaranteed an impartial jury and a fair trial. *LSA-Const. art. I, § 16*; ***State v. Brown**, 496 So. 2d 261, 263 (La. 1986)*; ***State v. Bell**, 315 So. 2d 307, 309 (La. 1975)*. If a prospective juror's inclination toward the death penalty (or life imprisonment) would substantially impair the performance of the juror's duties, a challenge for cause is warranted. ***State v. Ross**, 623 So. 2d 643, 644 (La. 1993)*. Venire member Allain candidly stated that she could not vote to impose the death penalty. Although she said she might be able to consider imposing the death penalty in the extraordinary case of one her own family members being murdered, she [Pg 21] subsequently equivocated and stated that even in such a

circumstance she was not sure she could vote for the death penalty. As such, her answers as a whole suggested that she might have been unable to render a judgment according to the law since she did not definitively state whether she could consider imposing a death sentence in this case. See ***State v. Jones***, *474 So. 2d 919, 928 (La. 1985)*, cert. denied, *476 U.S. 1178, 106 S. Ct. 2906, 90 L. Ed. 2d 992 (1986)*; see also ***State v. Nicholson***, *437 So. 2d 849, 854 (La. 1983)* (trial court properly excluded for cause juror who could return the death penalty only in the case of mass murderers such as Adolf Hitler or Charles Manson). Because her uncertainty likely would have prevented or substantially impaired her ability to make an impartial sentencing decision, see **Wainwright v. Witt**, the trial court properly granted the State's challenge for cause. Cf. ***State v. Tart***, *93-0772, p. 15 (La. 2/9/96),* **[*880]** *672 So. 2d 116, 124* (A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied.). Accordingly, this assignment of error also lacks merit.

GUILT PHASE

ARGUMENT NO. 5

(Assignment of Error No. 3)

In his third assignment of error, the defendant complains that gruesome photographs used in his trial violated his constitutional rights. Specifically, defense counsel objected to State's exhibits 77, 78,

and 79, all post-mortem autopsy photographs of Ms. Dupuis depicting the bullet wounds in her body. Counsel also objected to the introduction of State's exhibits 80, 81, and 82, all post-mortem autopsy photographs of Ms. Blanchard depicting each of the bullet wounds in her body.

The State is entitled to the moral force of its evidence, and post-mortem photographs of murder victims are admissible to prove *corpus delicti*, to corroborate other evidence establishing cause of death, as well as location and placement of wounds, and to provide positive identification of the victim. ***State v. Koon**, 96-1208, p. 34 (La. 5/20/97), 704 So. 2d 756, 776* (orig. hrg); **State v. Maxie**, 93-2158 (La. [Pg 22] 4/10/95), *653 So. 2d 526, 532 n.8, citing **State v. Martin**, 93-0285, p. 14 (La. 10/17/94), 645 So. 2d 190, 198.* Photographic evidence will be admitted unless it is so gruesome that it overwhelms jurors' reason and leads them to convict without sufficient other evidence. **State v. Koon**, 96-1208 at 34, *704 So. 2d at 776, citing **State v. Perry**, 502 So. 2d 543, 558-59 (La. 1986)*, cert. denied, *484 U.S. 872, 108 S. Ct. 205, 98 L. Ed. 2d 156 (1987).*

The six autopsy photographs were relevant to show the manner of death and the location of the bullet wounds on the victims' bodies. These photographs are not repetitive or cumulative and while these photographs were certainly unpleasant, they were not excessively gruesome. Cf. ***State v. Morris**, 245 La. 175, 157 So. 2d 728, 732 (1963).*

Accordingly, the defendant fails to show that the photographs were clearly more prejudicial than probative and that this court should interfere in the

trial court's exercise of its broad discretion to admit the evidence. This assignment is without merit.

PENALTY PHASE

ARGUMENT NO. 6

(Assignment of Error No. 6)

In his sixth assignment of error, the defendant argues that the death penalty is not appropriate in the instant case because the *Eighth Amendment of the United States Constitution* and *Article I, Section 20 of the Louisiana constitution* prohibit the execution of mentally retarded individuals. Defendant's brief was submitted prior to the United States Supreme Court's decision in ***Atkins v. Virginia, 536 U.S.304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)***, which held that the execution of the mentally retarded violates the Eight Amendment's prohibition against cruel and unusual punishment. In a supplemental brief filed in response to a request by this court, defense counsel strenuously argues that the defendant is indeed mentally retarded and, consequently, the **Atkins** decision prohibits imposition of the death penalty in this case.

In ***State v. Williams, 01-1650 (La. 11/01/02), 831 So. 2d 835, 2002 La. LEXIS 3066***, another decision rendered this date we stated: **[*881]**

> Defendant's case is governed by the recent decision from the United States Supreme Court, ***Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 2251-52, 153 L. Ed. 2d 335 (2002).*** In **Atkins**, the Court held that executing mentally

retarded offenders is excessive under the Eighth Amendment, which "'places a substantive restriction on the State's power to take the life.'" ***Atkins, 536 U.S. at 320, 122 S. Ct. at 2252*** (*quoting* ***Ford v. Wainwright, 477 U.S. 399, 405, 106 S. Ct. 2595, 2605, 91 L. Ed. 2d 335 (1986)*** (Eighth Amendment precludes execution of the insane).[20] This court is bound by the decision of the United States Supreme Court in **Atkins.**

Atkins is based on the "evolving standards of decency" that have occurred since the 13-year-old decision in ***Penry v. Lynaugh, 492 US. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989),*** allowed execution of a mentally retarded defendant. The Court noted that during the interim between **Atkins** and **Penry**, the practice of executing mentally retarded persons had become truly unusual. Thus, the Court found a national consensus had developed against such executions. Construing the Eighth Amendment in light of this documented evolution, the Court concluded execution of the mentally

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[20] The issue of whether execution of a mentally retarded person is barred by the Eighth Amendment and by the Louisiana Constitution has been raised by several defendants. See **State v. Carmeaux**, 93-2729 (La. 7/1/97), 699 So.2d 16, and cases cited therein. Those cases, however, were decided prior to the United States Supreme Court's pronouncement of a bar to such application of the death penalty in **Atkins.**

retarded was excessive and thus constitutionally barred. The Court reasoned that the mentally retarded, while not exempt from criminal sanctions, have diminished personal culpability. Further, mentally retarded defendants as a whole face a special risk of wrongful execution. Thus, the 13-year-old Penry precedent of allowing execution of a mentally retarded defendant is now a relic of the past.[21]

In Atkins, while extending Eighth Amendment protection to the mentally retarded, the United States Supreme Court left the imposition of the new rule to the states:

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[21] The mandate of **Atkins** that the State may not execute a mentally retarded person is retroactive to any case, at any stage of the proceedings, including the instant case, in which the defendant is facing the prospect of capital punishment. See ***State v. Sanders***, *523 So. 2d 209 (La. 1988)*, a case in which this court held new constitutional rules for the conduct of criminal trials will be given limited retroactive effect to all cases pending on direct review or still subject to direct review, unless the new rule is designed to overcome an aspect of the proceedings that impaired its truth-finding function; in the latter cases, the new rule will be given full retroactive effect. See also ***Penry***, *492 U.S. at 330, 109 S. Ct. at 2953*, ("If we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of non-retroactivity and would be applicable to defendants on collateral review.").

As was our approach in Ford v. Wainwright, with regard to insanity, "we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *477 U.S. 399, 405, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).*

***Atkins**, 536 U.S. at 317, 122 S. Ct. at 2250.*

Although the United States Supreme Court left the task of developing appropriate ways to enforce the constitutional restriction against execution of the mentally retarded to the states, the Court provided guidance in some areas. The Court adopted a "clinical definition" of mental retardation which requires not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction which became manifest before the age of 18. ***Id.**, 536 U.S. at 317, 122 S. Ct. at 2250.* This definition is based on the definition developed by the American Association of Mental Retardation (AAMR)[22] and is

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[22] "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety,

the definition utilized by the federal government [23] and in some form by most of the states that have statutes prohibiting the execution of the mentally retarded. [24]It also closely

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functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

***Atkins**, 536 U.S. at 307, 122 S. Ct. at 2245 n.3.*

Although the Court used the AAMR's definition in MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992), we note that MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed.), was published in 2002 shortly before the release of **Atkins**. Thus, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002) presumably was not available to the Court during briefing and argument stages of the litigation. The AAMR's 2002 definition is: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18." MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002).

The definition of mental retardation has been in a state of flux for over 65 years, evidenced by the definitions dating from Tredgold (1908, 1937) and Doll (1941, 1947) to the current AAMR 10th Edition definition. MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 19 (10th ed. 2002).

[23] *18 U.S.C.A. § 3596(c).*

[24] Ariz. Rev. Stat. Set. 13-3982; *Ark. Code Ann. Sect. 5-4-618* (1993); *Colo. Rev. Stat. Sec. 16-9-401-403*; *Conn. Gen. Stat. § 53a-46a*; *Fla. Stat. Ann. § 921.137*; *Ga. Code. Ann. § 17-7-*

follows the definition in AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000). [25]

The Supreme Court acknowledged "there is serious disagreement about ... determining which offenders are in fact retarded." ***Atkins, 536 U.S. at 317, 122 S. Ct. at 2250.*** Realistically, the Court noted that not all persons who claim to

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131(i); Ind. Code § 35-36-9-1; Kan. Stat. Ann. § 21-4623; Ky. Rev. Stat. § 532.120-140; Md. Cod. Ann. art. 27 § 412; Mo. Rev. Stat. 565.030; *N.M. State. Ann. § 31-20A-2.1;* Neb. Rev. Stat. § 28-105.1; *N.Y. Crim. Proc. Law § 400.27;* 2001 N.C. Sess. Laws 346; *S.D. Codified Laws § 23A-27A-26.1; Tenn. Code Ann. § 39-13-203; Wash. Rev. Code. § 10.95.030.*

[25] "The essential feature of Mental Retardation is significantly sub- average general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The onset must occur before age 18 years. Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000).

"Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. ***Id., at 42-43.***

Atkins, 536 U.S. at 307, 122 S. Ct. at 2245 n.3

> **[*882]** be mentally retarded will be so impaired as to fall within the group entitled to the **Atkins** prohibition against the death penalty. Noting that state statutory definitions of mental retardation are not identical, but are generally in conformity with the definitions cited in **Atkins**, the Court, nonetheless, left to the states the task of developing appropriate ways to determine which offenders will be spared the death penalty because of mental retardation. **[*883]**

State v. Williams, 01-1650 at ___, *831 So. 2d at 853, 2002 La. LEXIS 3066* at *40-43.

Not everyone who alleges mental retardation will be entitled to a hearing following the decision of the Supreme Court in **Atkins**. One who claims mental retardation so as to avoid the consequences of his actions must be carefully evaluated. According to the United States Supreme Court, those who are in fact mentally retarded must be spared the death penalty, but otherwise can be punished for their criminal acts. Those who are not mentally retarded should face the full consequences of their criminal acts. It would be a perversion of our criminal justice system if those who are not mentally retarded could escape the full consequences of their acts by merely claiming to be mentally retarded. This court is not prepared to order that everyone sentenced to death is entitled to a hearing to determine whether or not they are mentally retarded. Rather, that determination must be made on a case by case basis

applying the criteria established by this court in **Williams**.

In **Williams**, we instructed the trial court to treat the issue procedurally like a pretrial competency hearing. See *LSA-C.Cr.P. art 641 et seq.* The procedure should be appropriately modified to address assessment of mental retardation. For instance, when an evidentiary hearing is requested to decide whether a defendant faced with a capital sentence is mentally retarded, the courts should use the standard provided by statute for determining when a pre-trial competency hearing is necessary. See *LSA-C.Cr.P. art. 643* ("The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed."); see also, *LSA-C.Cr.P. art. 643*, cmt. (a) ("It is not enough that the defense has filed a motion urging the defense [of mental incapacity to proceed], but there must be sufficient evidence to raise a reasonable doubt as to such capacity."). Article 643 establishes a standard that a defendant must meet by coming forward with some evidence to put his mental condition at issue. For a discussion of *LSA-C.Cr.P.art. 641 et seq.* and the jurisprudence that applies to these procedures, see ***State v. Seals, 00-2738 (La. 10/25/02), 831 So. 2d 828.***

As stated in **Williams**:

> For example, *LSA-C. Cr.P. art. 644* governs the appointment of a sanity commission and the examination of the defendant. In pertinent part, *LSA-C.Cr.P. art. 644(A)* provides:

Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana.

We note that instead of physicians, experts with the appropriate expertise to diagnose mental retardation shall be utilized. In cases in which there must be a remand based on **Atkins,** this procedure will allow for court-appointed experts to examine the defendant and determine **[*884]** if indeed he meets the criteria for mental retardation established in *LSA-R.S. 23:381.* In addition, *LSA-C.Cr.P. art. 646* also gives the State and the defendant the right to an independent mental examination by an expert of their choice, a procedure which would also be beneficial in these matters. However, the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts. See ***State v. Snyder***, *98-1078, p. 26 (La. 4/14/99), 750 So. 2d 832, 852, citing* ***State v. Bennett***, *345 So. 2d 1129, 1137 (La. 1977).*

> The code also provides for a contradictory hearing, with *LSA-C.Cr.P. art. 647* stating:
>
> > The issue of the defendant's mental capacity to proceed [or in this case, the issue of whether or not the defendant is mentally retarded under applicable standards] shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.
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> **State v. Williams**, 01-1650, *831 So. 2d at 859.*

In summary, the defendant has the burden to come forward with some evidence to put his mental condition at issue. If the court has reasonable ground to doubt whether the defendant is mentally retarded, then the trial court shall order a mental examination of the defendant in conformity with the instructions provided by this court in **Williams**. Defendant has the burden of establishing his mental retardation by a preponderance of evidence at a hearing before the

trial court as opposed to a jury. See **State v. Williams**, 01-1650, *831 So. 2d at 859.*

In this matter Dr. Marc Zimmerman, a forensic psychologist, qualified as an expert in that field after the State stipulated to his expertise. He testified that Dunn is "mildly mentally retarded and that he has a pervasive pattern of brain dysfunction." Dr. Zimmerman, the only expert who did a clinical evaluation of Dunn, met with him a total of four times to administer the tests used for evaluation. His testimony indicated Dunn has a full scale IQ of 71 based on the Kaufman Adolescent and Adult Intelligence Test. Dr. Zimmerman admitted he did not view the video of the crime as it was unfolding, nor did he review the police report of the incident. He testified that Dunn has a lack of impulse control and is a slow learner who is able to perform well in a structured environment, but cannot perform in a rational manner in a chaotic situation. Although it was his opinion that Dunn is mentally retarded, we note Dr. Zimmerman's testimony did not adequately focus on the developmental period of Dunn's life-a critical time period for determining whether one is mentally retarded. The Louisiana statutory provision indicates a developmental disability attributable to mental retardation is manifested before the person reaches age 22. See *LSA-R.S. 28:381(12).* We also note that Dr. Zimmerman's diagnosis was not challenged with questions regarding evidence of Dunn's work history or educational achievements.

[*885] Over State's objection, the court accepted Ms. Patricia M. Percy as an expert in the field of forensic social work, indicating the jury could

determine the weight to be given her testimony. She classified defendant as having borderline intellectual functioning. She testified his cumulative school records from East St. John High School could not be located and were thus unavailable for review. Ms. Percy had available some of Dunn's report cards, supplied by his family, which indicate that although he did not do well in school there were no attendance problems. In spite of the fact that he did not do well in school and failed the 9th grade, he had never been identified as a child who was a slow learner. She testified that Dunn, the third of four children, did not have an alcohol or substance abuse problem.

Review of Ms. Percy's testimony does not support the State's contention that she testified that Dunn was not mentally retarded. Rather, her testimony indicates she deferred to Dr. Zimmerman on that issue. A fair reading of her testimony also establishes she testified although an IQ of 70 is generally considered the upper level for determining mental retardation, IQ standing alone cannot be used to determine whether one is mentally retarded. Nevertheless, the determination of whether Dunn is mentally retarded was not within the purview of her evaluation. There is no evidence to indicate she administered any tests to Dunn.

Dr. Sara DeLand qualified as an expert in the field of forensic psychiatry. She is employed by Tulane University in the division of forensic psychiatry and provided contract services to the State Department of Corrections through Tulane. She did not formally diagnose Dunn as mentally retarded, nor did she administer any test to him as she was not called upon to make that diagnosis. She

testified that he was "significantly intellectually limited-on the high end of mild mental retardation." A fair reading of her testimony indicates she did not rule out that he was mentally retarded indicating, "He's right on the edge."

The defense contends Dr. Zimmerman's uncontradicted expert testimony established the defendant was mentally retarded; therefore, this court should apply **Atkins** to exempt him from the death penalty. Contradictorily, the State urges this court to reject Dr. Zimmerman's testimony because of anecdotal evidence which established the defendant is not mentally retarded because of his adaptive skills. However, given the sparse record on this issue, this court cannot decide whether Dunn is mentally retarded. We are not suggesting this anecdotal evidence may not be relevant-rather this court cannot use that evidence to make a diagnosis on this record. The State never questioned Dr. Zimmerman regarding the relevance of many of the matters which the State now asserts establishes the defendant is not mentally retarded. We are not suggesting a deficiency in the manner the State questioned the witness; however, we note that an issue that was marginally relevant at the time of the trial became significantly relevant and an ultimate issue following the trial as a result of the United States Supreme Court's decision in **Atkins**.

Additionally, the State argues the simple fact that the jury imposed the death sentence reflects a finding that Dunn was not mentally retarded. This argument lacks merit because prior to the **Atkins** decision, execution of mentally retarded individuals was permissible. Furthermore, we have determined

that the issue of whether or not one is mentally retarded is to be determined by the court, not by a jury. See **[*886] State v. Williams**, 01-1650, *831 So. 2d at 851.*

The United States Supreme Court essentially altered the rules and altered a relevant fact after the trial. The State and the defense are both put in the impossible position of arguing whether a fact was established--*i.e.*, whether the defendant is mentally retarded-when that fact was simply not an issue which a fact finder was called upon to decide. A fact that was marginally relevant when this case was tried (whether the defendant is mentally retarded) became a fact which could determine the sentence to be imposed after the trial. The State and defense gallantly attempt to argue from this record; however, their efforts must fail because the significance of the issue of mental retardation was drastically changed after the trial as a result of **Atkins**. The relevance of whether or not this defendant is mentally retarded has increased exponentially. Neither the State nor defense was required to anticipate this change.

The defense was not called upon to exert time, energy, and effort in marshaling proof of mental retardation at the trial. Defendant needed only to establish diminished capacity as a mitigating factor. [7] There was no obligation to prove mental retardation, which after the trial became a bar to the death penalty. Nevertheless, although the defendant was not called upon to offer proof of mental

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[7] See LSA-C.C.r.P. art. 905.5(c).

retardation, the defendant did offer evidence of mental retardation.

It would be patently unjust to conclude from this record that the defendant failed to prove a fact which the defense was not called upon to prove at the time of the trial. Because the burden of proof of establishing mental retardation is imposed on the defendant, [8] the defendant must be afforded the opportunity to meet that burden in a case such as this in which an expert testified without contradiction Dunn is mentally retarded and his IQ is very close to that which would indicate mental retardation. [9] We reiterate that a defendant **[*887]**

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[8] The defendant bears the burden of proving he is mentally retarded by a preponderance of the evidence. See **State v. Williams**, 01-1650, *831 So. 2d at 859.*

[9] The Louisiana statutory provisions defining mental retardation specify that "significantly subaverage" intellectual functioning is two standard deviations below the mean for the test of intellectual functioning. *LSA-R.S. 28:381(42).* As stated in MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002), a text of the AAMR, the mean is 100. Depending on the IQ test administered, two deviations below the mean is an IQ of 70 on the Wechsler scale and an IQ of 68 on the Stanford-Binet scale. See **State v. Williams**, 01-1650 at n.25, *831 So. 2d at 853*; see also, AAMR text at p. 57.

Regardless of the test administered, each test is burdened with a range of plus/minus number of IQ points known as the standard error of measurement (SEM). For example, an SEM of 4 would indicate one with an IQ score of 71 could have an IQ between 67 and 75. Most definitions of mental retardation indicate "approximately" an IQ of 70 as the upper IQ cut off. Although Louisiana's definition of significantly subaverage intellectual functioning does not specifically use the word "approximately," because of the SEM any IQ test score has a

is not entitled to a post-**Atkins** hearing regarding mental retardation merely upon request.

Furthermore, neither the State nor the defendant had any guidance as to the proper definition, criteria, and procedure to utilize in determining when one is mentally retarded such that the death penalty could not be imposed. Based

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margin of error and is only a factor in assessing mental retardation. We also note that prison records indicate Dunn had an "estimated IQ of 76". Dr. DeLand testified because the Department of Corrections records reflect an estimated IQ "you can assume that they did not do the formal IQ testing, just because that's the way that it's reported."

According to Dr. Zimmerman, Dunn scored a 79 on his crystallized scales, a 65 on his fluid scales, and a full scale IQ of 71 on the Kaufman Adolescent and Adult Intelligence Test, a test which is not discussed in MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (10th ed. 2002). According to ALAN S. KAUFMAN AND NADINE L. KAUFMAN, MANUEL FOR THE KAUFMAN ADOLESCENT AND ADULT INTELLIGENCE TEST 83 (American Guidance Service 1993), the SEM for someone of Dunn's age tested on the Kaufman test is 2.6.

We note that common sense dictates an individual's motivation at the time of testing is a factor to be considered when assessing test results. Furthermore, not all individuals with a low IQ are mentally retarded. One with a low IQ could be intellectually limited, but not mentally retarded. Louisiana's definition of mental retardation includes a requirement that there be a severe chronic disability of a person attributable to mental retardation, manifested before age 22, likely to continue indefinitely, and resulting in substantial functional limitations in three or more of major life activities. See *LSA-R.S. 28:381(12)*. Thus mental retardation requires a low IQ combined with limitations in adaptive skills in three or more "areas of major life activity [such as] self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living." See *LSA-R.S. 28:381(12)*.

on the record in this case, this court lacks sufficient factual evidence to make the legal determination of whether or not the defendant is mentally retarded. This factual/legal determination must be made following a hearing during which the court will be guided by evaluation and diagnosis made by those with expertise in diagnosing mental retardation.

Because the record contains sufficient evidence in the form of Dr. Zimmerman's uncontradicted expert opinion, there exists reasonable ground to doubt whether defendant is mentally retarded. Thus, the Supreme Court opinion in **Atkins** mandates that the issue of Dunn's mental retardation be resolved. In light of **Atkins** and testimony of Dr. Zimmerman who clearly and without contradiction testified Dunn is mentally retarded, this court is obligated to follow the dictates of the United States Supreme Court and remand for a hearing on the issue of whether or not Dunn is in fact mentally retarded.

Concepts of judicial economy dictate that the issue of whether Dunn is mentally retarded be resolved now. Without a resolution of this issue at a hearing, this matter could linger in the court system far too long. This court is not insensitive to a need for closure and resolution for all involved. However, a change in the law by the United States Supreme Court after this case was tried dictates the necessity to remand.

Our decision to remand for a hearing should in no manner be construed as a determination that Dunn is mentally retarded. That issue must be resolved at a hearing before the trial court. Although Dr. Zimmerman testified without contradiction that

Dunn is mentally retarded, there are other factors which may well establish that he is not. The record contains evidence that he received college credit for courses completed during his incarceration. Additionally, upon his release from prison he was successfully employed for a period of time of approximately 18 months before being laid off with a recommendation for rehire should market conditions change. [10]

This matter is remanded to the district court to conduct a hearing in conformity with the procedure outlined in this case. We retain jurisdiction for review of the **[*888]** penalty in the event defendant is not determined to be mentally retarded. [11]

MISCELLANEOUS

ARGUMENT NO. 7

(Assignment of Error 1(A))

In his first assignment of error, defendant argues that the cumulation of error in this case mandates that the court grant him a new trial and sentencing hearing. As to this argument, "the combined effect of the incidences complained of, none of which amounts to reversible error, did not deprive the defendant of his right to a fair trial." ***State v. Copeland***, *530 So.*

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[10] The record is devoid of evidence establishing the content of the courses he completed and devoid of evidence regarding his job responsibilities.

[11] If the trial court determines defendant is mentally retarded and the State chooses to appeal that determination, this court remains the proper forum for that appeal. See *LSA-C.Cr.P. art. 913*; **State v. Langley**, 95-1489, p. 2 n.1 (La. 4/3/02), *813 So. 2d 356, 359 n.1*

2d 526, 544-45 (La. 1988) (*citing* ***State v. Graham,*** *422 So. 2d 123, 137 (La. 1982)*); ***State v. Sheppard,*** *350 So. 2d 615, 651 (La. 1977).* This argument is without merit.

DECREE

For the reasons assigned, we affirm the defendant's conviction for the murders of Lisa Dupuis and Jacqueline Guillot Blanchard. We pretermit review of the penalty phase of defendant's trial and remand to the district court for a hearing in conformity with this opinion to determine whether or not defendant is mentally retarded.

CONVICTION AFFIRMED. CASE REMANDED FOR EVIDENTIARY HEARING CONSISTENT WITH THIS OPINION TO DETERMINE WHETHER DEFENDANT IS MENTALLY RETARDED.

CONCUR BY: JEFFREY P. VICTORY (In Part)

DISSENT BY: JEFFREY P. VICTORY (In Part)

DISSENT

VICTORY, J., concurring in part and dissenting in part.

For the reasons given today in my partial concurrence and dissent in ***State v. Williams***, 01-*KA-1650 (La. 11/01/02), 831 So. 2d 835, 2002 La. LEXIS 3066,* I respectfully concur in part and dissent in part.

APPENDIX C

SUPREME COURT OF LOUISIANA
STATE OF LOUISIANA
V.
JAMES DUNN

State v. Dunn, 2001-KA-1635 (La., June 25, 2010)(unpublished)

Rehearing Denied.